Telecommunications Regulation and the Constitution

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Foreword

Our "patriated" constitution deals with only one part of the distribution of powers between the federal and the provincial governments that was among the areas of contention in the constitutional discussions from 1978 to 1980. That one area is jurisdiction over resources, a matter of fundamental concern to the western provinces. An area of possibly equal concern to Quebec and of substantial concern to several other provinces has not been dealt with: jurisdiction with respect to communications. It is a very large and important area and one that will be of increasing importance in decades to come. It includes the power to control and to regulate radio and television broadcasting and the whole expanding field of telecommunications. Canadians are becoming increasingly aware of the way in which new technologies are producing an explosive growth in this field. The Committee on the Implications of Telecommunications for Canadian Sovereignty, chaired by the Honourable J.V. Clyne, was not exaggerating when it said:

> What is happening now in telecommunications will set the terms of life in the 21st century just as surely as what happened in the 19th century industrialism set the terms of life in the 20th century. And Canadians of this generation, as we confront the challenge of telecommunications, are preparing the framework for the national life of Canada in the 21st century — just as Canadians of the 1870s and the 1880s determined the shape of 20th century Canada by building our national railroads.

While the committee was focusing on the national implications of telecommunications, governments in Quebec and in some other provinces have been equally concerned over the importance of communications in all its aspects for their own provinces and people. The government of Quebec has sought to expand provincial jurisdiction and provincial powers of regulation because it thinks the implications of broadcasting and of telecommunications generally can be vital for the French language and culture of that province. The constitutional discussions from 1978 to 1980 clarified the issues and

emphasized the differences, but they brought no agreement on where jurisdiction should lie or, if it should be divided, what the lines of division should be.

The Constitutional Conference of September 1980, following two months of work by ministers and officials, was presented with two drafts on communications. One was a "best efforts" draft that had the agreement of all the provinces, but not of the federal government. It was based on concurrent federal and provincial jurisdiction in the entire field with provincial paramountcy in all but a few specific areas. The federal draft, on the other hand, would have given exclusive jurisdiction to Parliament, with specific exceptions that would be areas of provincial jurisdiction. No agreement was reached and the matter remains unresolved. To facilitate public debate on this important problem, the Institute offers the four papers contained in this volume. They were commissioned with the financial assistance of the TransCanada Telephone System, which fully respected the independent status of the Institute and made no attempt to influence in any way the work or the conclusions of the authors.

The Institute asked a political scientist (Richard Schultz), an economist (Barry Lesser), and three lawyers (Robert Buchan, Christopher Johnston, and Gregory Kane) to analyse the federal and provincial positions and to put forward their own views as to how the conflicts over regulatory jurisdictions with respect to telecommunications might be resolved. All four papers indicate that regulatory powers cannot be allocated on a mutually exclusive basis. In one way or another it appears that what has been federal jurisdiction over interprovincial telecommunications services, because it cannot be divorced from provincial jurisdiction over wholly intraprovincial matters, will have to be shared in some way with the provinces. Finding a mutually acceptable way of doing this has been and will be most difficult. How can national objectives in both economic and cultural terms be met while recognizing the interdependency of federal and provincial spheres of action? The problem is made more difficult by the wide scope and rapid pace of technological change in the telecommunications industry. It is apparent even now that technological changes may frustrate the best efforts of the regulators, regardless of who they may be. While the debate over jurisdiction goes on and while technological changes revolutionize the system, the various federal and provincial regulatory agencies are continuing to make decisions based on existing statutory provisions.

Since these papers were written, CNCP Telecommunications, in June 1982, published "Crisis in Canadian Telecommunications Policy and Regulation." It reiterates a position taken in 1979 when a CNCP submission said:

It is also noted that what is contemplated here is a full exercise of federal legislative jurisdiction, embracing all members of TCTS in relation to their whole telecommunications undertakings. This is thought to be essential to effective regulation. While this will be an encroachment on the powers now (unconstitutionally) exercised by provincial regulatory bodies, it will expand provincial participation into interprovincial telecommunications regulation.

There can be no doubt about the importance of the issue: nor can there be doubt about the difficulty of solution. A failure to reach agreement will not suspend the decision by regulators: they will go on, with implications for the future in many areas of national and regional life. The Institute hopes that this volume may be a contribution to the unresolved debate as to where and how regulation of telecommunications can best be exercised in the light of the many issues involved.

Gordon Robertson
President
June 1982

Avant-propos

Notre constitution « rapatriée » ne traite que d'un aspect de la répartition des pouvoirs entre le fédéral et les provinces qui constituait l'un des points en litige au cours des pourparlers constitutionnels de 1978 à 1980. Il s'agit de la compétence en matière de ressources, une question qui intéresse au plus haut point les provinces de l'Ouest. On n'a pas réglé une question qui préoccupe possiblement tout autant le Québec et sensiblement plusieurs autres provinces : la compétence en matière de communications. Il s'agit là d'un domaine aussi vaste qu'important, qui est appelé à prendre de plus en plus d'ampleur dans les prochaines décennies. Y entrent le pouvoir de contrôler et de réglementer la radiodiffusion et le vaste champ, en pleine expansion, des télécommunications. Les Canadiens prennent de plus en plus conscience de la croissance débridée de ce domaine que provoquent les nouvelles techniques. Le Comité consultatif des télécommunications et de la souveraineté canadienne, présidé par l'honorable J.V. Clyne, n'exagérait nullement en déclarant :

> Ce qui se produit maintenant dans les télécommunications déterminera le mode de vie au XXI^e^ siècle aussi surement que l'industrialisation du XIX^e^ siècle a déterminé le mode de vie du XX^e^. Les Canadiens de la présente génération, qui doivent relever le défi des télécommunications, mettent en place le cadre de vie du Canada du XXI^e^ siècle — tout comme les Canadiens des années 1870 et 1880 ont tracé la voie au Canada du XX^e^ siècle grâce à la construction des chemins de fer.

Pendant que le comité se penchait avant tout sur les implications nationales des télécommunications, les gouvernements du Québec et de quelques autres provinces se préoccupaient tout autant de l'importance des multiples facettes des communications pour leurs propres provinces et leurs populations. Le gouvernement du Québec, croyant que les ramifications de la radiodiffusion et des télécommunications en général peuvent être décisives pour la langue et la culture québécoise, a cherché à élargir le champ de compétence et les pouvoirs de réglementation des provinces en ce domaine. Les pourparlers

constitutionnels de 1978 à 1980 ont permis de définir les problèmes et de mettre en relief les différences sans toutefois permettre de décider à qui revenait la compétence ou, si elle devait être partagée, quelles devaient être les lignes de partage.

La conférence constitutionnelle de 1980, qui clôturait deux mois de travail des ministres et des fonctionnaires, a étudié deux projets sur les communications. L'un d'eux, un projet réunissant les plus grands efforts de tous, avait reçu l'assentiment des provinces mais non du fédéral. Il prônait une compétence commune du fédéral et des provinces dans l'ensemble du secteur, les provinces se réservant la suprématie partout sauf dans quelques domaines bien précis. Le projet fédéral, par contre, aurait accordé la compétence exclusive au Parlement, exception faite de certains domaines qui auraient relevé des provinces. On n'a pu s'entendre, et le problème demeure entier. Afin de favoriser le débat public sur cet important problème, l'Institut présente les quatre textes de ce volume. Ils ont été commandés grâce à l'aide financière du Réseau téléphonique transcanadien, qui a pleinement respecté l'indépendance de l'Institut et n'a nullement tenté d'orienter les conclusions des auteurs.

L'Institut a demandé à un politicologue (Richard Schultz), à un économiste (Barry Lesser) et à trois avocats (Robert Buchan, Christopher Johnston et Gregory Kane) d'analyser la position du fédéral et celle des provinces, et de faire part de leurs propres opinions quant à la manière de régler les conflits suscités par la question de la compétence en matière de télécommunications. Les quatre textes s'entendent pour affirmer que l'on peut répartir les pouvoirs de réglementation de façon mutuellement exclusive. D'une manière ou d'une autre, il semble que le fédéral devra partager avec les provinces son pouvoir de réglementation des services de télécommunication interprovinciaux, car celui-ci ne peut être distingué parfaitement de la compétence provinciale visant des questions exclusivement provinciales. Il a été et sera toujours très difficile de s'entendre sur une façon de faire cela. Comment atteindre des objectifs nationaux, tant économiques que culturels, tout en reconnaissant l'interdépendance des champs d'activité fédéraux et provinciaux? L'ampleur et le rythme du changement technologique dans l'industrie des télécommunications ne font qu'exacerber le problème. Il est déjà évident que les changements technologiques peuvent déjouer les plus grands efforts des réglementateurs, peu importe leur identité. Pendant que se poursuit le débat et que les changements technologiques révolutionnent le système, les divers organismes de réglementation du fédéral et des provinces continuent de prendre des décisions en s'inspirant des dispositions des lois en vigueur.

Depuis la rédaction de ces textes, les Télécommunications CNCP ont publié, en juin 1982, *Situation critique des politiques et réglementa-*

tions canadiennes des télécommunications. On y maintient la position adoptée en 1979 dans un mémoire du CNCP, qui affirmait :

> On remarque aussi que l'on songe ici à exercer pleinement la compétence législative du fédéral qui touche tous les membres du R.T.T. dans toutes leurs activités de télécommunication. On croit que cela est essentiel à l'efficacité de la réglementation. Tout en empiétant sur les pouvoirs exercés (inconstitutionnellement) par les organismes de réglementation provinciaux, on verra s'accroître la participation des provinces à la réglementation des télécommunications interprovinciales.

On ne peut douter ni de l'importance du problème ni de la difficulté de sa solution. L'absence d'une entente n'empêchera pas les organismes de réglementation de décider : ils poursuivront leurs activités, avec tout ce que cela signifie pour l'avenir de nombreux secteurs de la vie nationale et régionale. L'Institut espère que ce volume pourra contribuer au débat sur la meilleure façon d'exercer la réglementation en matière de télécommunications a la lumière des nombreux enjeux en cause.

Gordon Robertson
Président
Juin 1982

Preface

Work began on this collection of papers early in 1981. It was prompted by the large gap in the federal and provincial positions on the allocation of powers concerning telecommunications during the constitutional negotiations in 1980. (The two positions as of August 1980 are set out in Appendices C and D of this volume.)

In my "project proposal" of February 1981 I described the work to be undertaken in the following terms:

> The project is designed to produce three parallel/independent, but broad-ranging assessments of the two official proposals put forward by the federal government and the provinces as to which level of government should regulate what aspects of telecommunications. For this volume, telecommunications is taken to mean the operations of the telephone companies and their present or potential competitors in the foreseeable future.
>
> The purpose of the proposed volume of papers is to analyze the federal and provincial positions from three perspectives: the political scientist, the lawyer, and the economist. What are the technical, economic, and administrative implications of the two proposals? Are there alternatives that meet the concerns of both "sides," but offer a better way to solve the conflict? What of the interests of the public and private enterprises that make up the various facets of our large telecommunications industry — how will they be affected under the two proposals? And what about the effects on the various telephone users?
>
> It is expected that each paper will explore the potential impact of both the federal and provincial positions in terms of such aspects as
> — The quality and price of telephone services to the consumer
> — The financial implications for the owners (public or private) of telecommunications carriers
> — The regulatory institutions and type of regulation that might result under the two proposals
> — The technical issues involved in maintaining a national and international system of telecommunications services

— The implications of the proposals for technological change including, for example, the relationship of telecommunications carriers to cable TV operators
— The impact on the producers of telecommunications equipment in Canada (industrial strategy issues perhaps)
— The structure of costs incurred by producers and prices paid by consumers — including the question of cross-subsidization.

This list is not exhaustive of course. Only a thoughtful enquiry into the area will produce a reasonably complete list of central issues. It seems important that researchers seek to discern the views of the main actors (both those that can effect the decision and those that will be affected by it). It is important also that the advantages and disadvantages of the two proposals be outlined from the perspective of different actors. The authors should also assess the proposals in light of the Province of Quebec's particular concerns about the relationship between communications and culture.

Finally, the Institute is also anxious to see the authors propose alternative divisions of regulatory powers and to make carefully reasoned recommendations for public policy in this important area.

By May 1981, Professors Schultz and Lesser and Messrs Buchan and Johnston had agreed to undertake the three main papers. First drafts of the papers were completed in August. They were sent to about twenty knowledgeable individuals in provincial governments, the federal government, telecommunications carriers, and in academia. These individuals then met with the authors on 14 September 1981 for an all-day seminar on the papers.

In the language of diplomacy, a "full and frank exchange of views" occurred. In the course of the lively discussion, a number of the participants urged Gregory Kane to develop his proposal for a joint panel of federal and provincial regulators to consider telecommunications matters having Canada-wide implications. The Institute agreed to finance Mr. Kane's efforts and to include his paper in this volume. Following the seminar the authors revised their papers for publication.

On behalf of the authors and The Institute for Research on Public Policy, I wish to record my appreciation to the TransCanada Telephone System for its financial assistance in meeting part of the costs of this volume.

W.T. Stanbury
Director
Regulation and Government Intervention Program
April 1982

Préface

C'est au début de 1981 que l'on a commencé à travailler à ce recueil de textes. C'est le profond écart entre la position du fédéral et celle des provinces relativement à la répartition des pouvoirs en matière de télécommunications, qui s'est révélé au cours des négociations constitutionnelles de 1980, qui l'a inspiré. (Les deux positions en date de septembre 1980 sont décrites aux annexes C et D de ce volume.)

Dans mon projet de février 1981, je décrivais le travail à effectuer comme suit :

> Cette étude veut produire trois évaluations parallèles/indépendantes et approfondies des deux projets officiels présentés par le gouvernement fédéral et les provinces quant à quel niveau de gouvernement devrait réglementer quels aspects des télécommunications. Aux fins de ce volume, les télécommunications signifient les activités des compagnies de téléphone et de leurs concurrents actuels ou éventuels dans un avenir prévisible.
>
> Le recueil de textes veut analyser les positions fédérale et provinciale de trois points de vue : celui du politicologue, celui de l'avocat et celui de l'économiste. Quelles sont les implications techniques, économiques et administratives des deux projets? Existe-t-il d'autres solutions qui répondraient aux inquiétudes des deux parties mais qui permettraient une solution plus satisfaisante du conflit? Et qu'en est-il des intérêts des entreprises publiques et privées qui composent les divers éléments de la vaste industrie des télécommunications — comment les deux projets les affecteront-elles? Et les effets sur les divers utilisateurs du téléphone?
>
> On prévoit que chaque texte examinera les effets éventuels des positions fédérale et provinciale en tenant compte des aspects tels :
> — la qualité et le prix des services téléphoniques au consommateur,
> — les implications financières pour les propriétaires (publics ou privés) des sociétés exploitantes des télécommunications,
> — les institutions de réglementation et le type de réglementation qu'entraîneraient les deux projets,

— les dimensions techniques du maintien d'un réseau national et international de services de télécommunication,
— les implications des projets quant aux changements technologiques, y compris, par exemple, les rapports entre les sociétés exploitantes des télécommunications et les télédistributeurs,
— les effets sur les producteurs de matériel de télécommunication au Canada (peut-être les questions de stratégie industrielle),
— la structure des coûts assumés par les producteurs et des prix payés par les consommateurs — y compris la question des subventions compensatoires.

Cette liste n'est évidemment pas complète. Seule une recherche approfondie en ce domaine donnera une liste raisonnablement complète des principales questions. Il semble important que les chercheurs s'efforcent de bien saisir le point de vue des principaux acteurs (tant ceux qui seront responsables de la décision que ceux qu'elle affectera). Il est aussi important de présenter les avantages et les désavantages des deux projets du point de vue des différents acteurs. Les auteurs devraient aussi évaluer les projets à la lumière des préoccupations particulières de la province de Québec quant au rapport entre les communications et la culture.

En dernier lieu, l'Institut tient aussi à ce que les auteurs présentent d'autres possibilités de répartition des pouvoirs de réglementation et fassent des recommandations bien réfléchies quant à la politique à adopter face à cette importante question.

En mai 1981, les professeurs Schultz et Lesser ainsi que MM. Buchan et Johnston avaient accepté de rédiger les trois principaux textes. Les premiers brouillons étaient prêts en août. On les a transmis à une vingtaine de personnes compétentes en la matière au sein des gouvernements provinciaux, au gouvernement fédéral, dans les sociétés exploitantes et dans les universités. On a ensuite organisé un colloque d'une journée, le 14 septembre 1981, qui a permis à ces personnes de discuter de leur texte avec les auteurs.

La rencontre aura permis d'échanger franchement et sans détours. Au cours de cette discussion animée, certains des participants ont demandé à Gregory Kane d'élaborer son projet de table ronde conjointe de réglementateurs fédéraux et provinciaux pour étudier les questions de télécommunication ayant une incidence sur l'ensemble du Canada. L'Institut a accepté de financer les travaux de M. Kane et d'inclure son texte dans ce volume. Suite au colloque, les auteurs ont révisé leurs textes pour la publication.

Au nom des auteurs et de l'Institut de recherches politiques, je veux faire part de mon appréciation au Réseau téléphonique transcanadien

pour son aide financière qui a servi à payer une partie des coûts de ce volume.

W.T. Stanbury
Directeur
Programme de réglementation et
d'intervention gouvernementale
Avril 1982

The Authors

Robert J. Buchan graduated from the University of Toronto in 1962 with an Honours B.A. (Cum Laude) in political science and economics. Subsequently he received an M.A. in jurisprudence from Oxford University and an LL.B. from the University of British Columbia. From 1964 until 1975 he was employed as a foreign service officer by the Departments of Industry, Trade and Commerce and External Affairs, doing work of an economic and legal nature, both in Canada and abroad. From 1975 to 1977 Mr. Buchan was special policy adviser to the federal deputy minister of communications, with special responsibility for legislative and constitutional matters. He was the instructing officer responsible for preparation of the proposed federal Telecommunications Act, which was first introduced into Parliament in March 1977 as Bill C–43. In addition, he participated actively in a number of the federal/provincial conferences and negotiations during that period relating to the respective roles and responsibilities of both orders of government in the field of telecommunications.

In August 1977 Mr. Buchan entered the private practice of law with the Ottawa law firm of Gowling & Henderson, concentrating in the area of administrative law. He has written a number of papers related to broadcasting policy and law and has appeared as a panelist at various symposia organized by the Canadian Bar Association and the International Institute of Communications.

C. Christopher Johnston took his legal training at Osgoode Hall Law School and was called to the Ontario Bar in 1965. In 1972 he joined the CRTC as a legal counsel and in 1975 was appointed its general counsel. In 1976 the CRTC acquired jurisdiction over the federally regulated telecommunications carriers and Mr. Johnston became involved in the development of new regulatory practices and procedures governing such carriers. In 1977 he returned to private practice, concentrating in communications law. He has lectured on this subject at Carleton University and at Continuing Education Programs of the Law Society of Upper Canada. In 1978 he prepared background papers on communications jurisdiction for the Canadian Bar Association's Committee on the Constitution and assisted in

drafting the chapter on telecommunications in the committee's constitutional study entitled *Towards a New Canada*. In 1980 the Law Reform Commission of Canada published his study *Canadian Radio-television and Telecommunications Commission*, which dealt with the administrative procedures of the CRTC.

In September 1980 Robert Buchan and Mr. Johnston entered into partnership and established a practice in Ottawa that deals primarily with questions of administrative and constitutional law.

T. Gregory Kane practices law in Ottawa with the firm Stikeman, Elliott, which has principal offices in Montreal and Toronto as well as other branch offices in London, England and Hong Kong.

Mr. Kane graduated from the Faculty of Common Law, University of Ottawa in 1969 and immediately thereafter was engaged in a Law and Communications project for the Government of Ghana, West Africa under the auspices of the Canadian University Service Overseas (CUSO) and the Canadian International Development Agency (CIDA) respectively.

He has served as general counsel and program director for the Regulated Industries program of the Consumers' Association of Canada and associate general counsel at the Canadian Radio-television and Telecommunications Commission (CRTC).

Mr. Kane has written extensively on administrative law subjects and is the author of the book *Consumers and the Regulators: Consumer Intervention in the Federal Regulatory Process* (Montreal: The Institute for Research on Public Policy, 1980). He is editor of the *Regulatory Reporter*, which is a comprehensive, monthly digest service covering the regulated fields of communications, transportation, and energy published by the Canadian Law Information Council.

In 1980, Mr. Kane acted as Counsel to the House of Commons Special Committee on Regulatory Reform and following that has become an adviser to the Law Reform Commission of Canada in its Administrative Law project. In addition, Mr. Kane is a part-time professor in the Faculty of Common Law, University of Ottawa teaching a course in communications law.

Barry Lesser was born in Halifax and received his undergraduate education at Dalhousie University, where he graduated with a B.Comm (First Class Honours — Economics) in 1968. Subsequently he received the M.A. and Ph.D. degrees in economics from Cornell University. In 1973 he joined the faculty at Dalhousie where he is now an associate professor of economics. He has worked extensively in the field of telecommunications economics, being particularly interested in the question of the impact of telecommunications on social and economic development, both in Canada and elsewhere. He has worked as a consultant to the Department of Communications on the work of Study Group No. 1 of the ITU's GAS/5 project. In the spring of 1979, he

undertook a report for the ITU on *The State of Telecommunications Services in the Least Developed Countries and Special Measures for Development*. During 1981 he completed a study for the ITU on *The Socio-Economic Development Benefits of Telecommunications* and in July 1981 he acted as an external reviewer to the ITU on a consultant's report on "Appropriate Telecommunication Technology for Integrated Rural Development in Africa." He has also written a number of other papers and reports in the field of telecommunications, including, among others, (Co-author) *Telecommunications Regulation in Nova Scotia — A Study of the Tariff Objectives of Maritime Telegraph And Telephone Company Limited*, a university research grant project undertaken for the Department of Communications in 1976; (Co-author) *The Importance of Telecommunications to Regional Economic Development*, a university research grant project undertaken for the Department of Communications in 1978; the conference paper "On Assessing the Benefits of Telecommunications: Some Proposed Methodologies," presented to a conference sponsored by the ITU and OECD in Paris, December 1978.

Richard J. Schultz is an associate professor at the Centre for the Study of Regulated Industries and Department of Political Science, McGill University. He worked from 1975 to 1977 for the Federal-Provincial Relations Office, Government of Canada, and acted as a consultant to the Bryce Royal Commission on Corporate Concentration and the Lambert Royal Commission on Financial Management and Accountability. He currently acts as a consultant to Bell Canada on regulatory developments in the telecommunications sector. He is the author of two books, *Federalism and the Regulatory Process* (Montreal: The Institute for Research on Public Policy, 1979) and *Federalism, Bureaucracy and Public Policy: The Politics of Highway Transport Regulation* (Montreal: McGill-Queen's University Press, 1980).

W.T. Stanbury is professor of policy analysis in the Faculty of Commerce and Business Administration at the University of British Columbia. Between June 1978 and November 1979 he was director of the Regulation Reference for the Economic Council of Canada and was responsible for preparing its *Preliminary Report* (November 1978) and its *Interim Report* (November 1979). Dr. Stanbury then became director of research for the Regulation Reference until August 1980. Since November 1977 he has been director of the Regulation and Government Intervention Program of The Institute for Research on Public Policy.

Dr. Stanbury received his B.Comm. from U.B.C. (1966) and his M.A. (1969) and Ph.D. (1972) degrees in economics from the University of California at Berkeley. At U.B.C. he teaches courses in policy analysis and government regulation of business. His research has ranged quite

widely — from the problems of native peoples, to competition policy and government regulation. In 1976 and 1977, Dr. Stanbury acted as a consultant and researcher for the Royal Commission on Corporate Concentration. He has also been a consultant to the Bureau of Competition Policy of the federal Department of Consumer and Corporate Affairs and to B.C. Tel.

He is the author or co-author of more than 80 publications. For example, his articles on competition policy have appeared in the *Antitrust Bulletin, Canadian Business Law Journal, Osgoode Hall Law Journal, Canadian Competition Policy Record*, as well as in a number of books. His latest volume for the Institute is *Government Regulation: Scope, Growth, Process* (Montreal: The Institute for Research on Public Policy, 1980).

Part I

Telecommunications Regulation and the Constitution: The Main Themes

W.T. Stanbury

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The purpose of this introduction is to identify and briefly discuss a number of the major themes in the papers in this volume. First, we indicate the large stakes involved for the principal actors in the regulation of telecommunications in Canada. Secondly, we discuss the fact that constitutional conflict over telecommunications exists in a larger context of federal-provincial conflict over a wide variety of matters. Thirdly, we describe the ambiguity that surrounds both the federal and provincial governments' constitutional claim to jurisdiction over telecommunications. Fourthly, we examine the importance of technological and economic change for the regulation of telecommunications and the competing claims to jurisdiction. Fifthly, we note that all the authors in this volume find both the federal and provincial proposals of August 1980 for the allocation of powers over telecommunications to be severely wanting in a number of respects. Finally, we examine the alternatives advanced by the authors in the hope of reconciling the dispute: some form of joint board, panel, or regulatory agency.

Big Stakes

In general, conflict is sharpened when the stakes are perceived to be large. In a country as vast and disparate as Canada, telecommunications issues take on a striking importance. The telecommunications industry is important economically and politically. Canada is one of the most "wired" countries in the world: 99 per cent of all households have at least one telephone; 97 per cent have one or more television sets (one half of which are connected to a cable television system); and over 98 per cent of households own at least one radio.

The federal government and the government of Quebec, in particular, view control over telecommunications as integral to their "nation-building" activities in terms of sovereignty, cultural identity, and unity. The proposed federal Telecommunications Act (Bill C–16) of 1979 speaks of policies designed to "safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada." Telecommunications is to be used to strengthen the links within and among all parts of Canada. Domestic ownership, regulation, and control of telecommunications systems and services are emphasized. For the prairie provinces, which also own their own telephone companies, there is a particular concern relating to the use of regulation to achieve subsidization of flat-rate local exchange service at the expense of toll-based, long-distance service. (We shall discuss this point in more detail below.)

Presently, the annual revenues of the major telephone companies in Canada (including Telesat, Teleglobe, and CNCP Telecommunications) exceed $6 billion.[1] Cable television revenues amount to another

$350 million per year[2] — and this total, of course, does not include pay television, which has only just been approved by the CRTC.[3]

As large as these figures are, they understate the economic importance of the telecommunications sector for several reasons. First, they exclude broadcasting (radio and television revenues amount to over $1 billion).[4] Secondly, the activities of telecommunications equipment manufacturers are excluded. Thirdly, and most importantly, the figures give no idea of what most observers believe to be the economic potential associated with the coming "information society."[5]

The potential use of telecommunications policy to achieve a wide variety of objectives in other sectors such as banking, publishing, and manufacturing gives telecommunications policy greater importance than it otherwise might. Moreover, policies using telecommunications are valuable tools in "province-building" activities of many sorts.

Federal-Provincial Relations

Professor Richard Schultz reminds us that the "quintessential political question" is "who will decide" what our telecommunications policies or policies for telecommunications will be.[6] Yet, as Cairns has remarked, "contemporary Canadian federalism is about governments."[7] The result is that intergovernmental conflict may sacrifice the interests of the polity in favour of the interests of the governments themselves. Governments do not fight for jurisdiction with a view of *not* exercising their power to influence the behaviour of private or subordinate public-sector actors. While both levels (or orders) fight about *who* will regulate, the consumer and producer interests in less government regulation in general[8] are lost in the dust of battle.

What is interesting is that our intricate, almost Rube Goldberg, system of federal and provincial regulation over publicly, privately, and jointly owned carriers[9] was not the subject of federal-provincial conflict until the 1970s. Schultz remarks that "in an earlier era much, if not most, telecommunications decision making resided in the private sector with government playing a secondary role."[10] One has only to think of the formation of the TransCanada Telephone System (TCTS) in 1931 and the fact that the interprovincial long-distance rates it set by unanimous agreement were not subject to any regulation until the late 1970s.[11]

Along with fiscal decentralization[12] came the rise in provincial claims for greater provincial autonomy, and consultation concerning what had heretofore been seen as solely federal matters. Federal activism was now defined as unwarranted "intrusion."

Schultz has divided federal-provincial relations concerning telecommunications into three phases: preliminary skirmishes between

1970 and 1972; negotiations between 1973 and 1975; and the negotiations since 1976.[13] It was a federal *Green Paper* in 1973 that first really galvanized provincial concerns over telecommunications policy.[14] They surfaced at the first Conference of Communications Ministers in November 1973 where the provinces pushed for a transfer of decision making from the federal level. In 1975, the provinces put forward a "consensus position" that, among other things, demanded provincial control over all aspects of cable distribution systems and services and regulatory control over telecommunications carriers whose facilities were located substantially within the boundaries of a single province.[15] Prior to the 1975 conferences, the federal government released a *Grey Paper* outlining its proposals concerning consultative procedures in areas hitherto exclusively federal.[16] Both sides found the other's proposals unacceptable.

As Schultz points out, "for several years after 1975, the federal-provincial negotiations concentrated almost exclusively on two issues, the delegation of some degree of responsibility for cable to the provinces and an enlarged degree of political control over the federal regulatory agency, the CRTC."[17] In 1976, the federal government and Manitoba did enter into an agreement ceding substantial control to the province[18] — although the CRTC's subsequent decisions limited application of the agreement.[19] Three decisions of the CRTC in the latter part of the 1970s increased the provinces' desire for more control over telecommunications. These were the *Challenge Communications* decision liberalizing terminal attachment in October 1977,[20] the CNCP application for system interconnection, which was approved in May 1979,[21] and the decision of the CRTC in October 1978 to carry out an extensive inquiry into TCTS rates and practices.[22] We note that the provinces were unsuccessful in having the CNCP decision varied by Cabinet.

Therefore, as the constitutional talks began in the summer of 1980, both levels of government could look back on "no substantive ... agreement on either the allocation of roles and responsibilities for the levels of government or on general policies for telecommunications."[23] This was despite, in Schultz's words, "almost a decade of negotiations that included six federal-provincial and five interprovincial conferences and innumerable ministerial and official meetings."[24] As we shall see, the two sides' positions were almost equally far apart after the climatic meeting in August 1980.[25]

Constitutional Ambiguity

Federal regulation of certain telephone companies has existed since 1906, although Bell Telephone was incorporated by a Special Act of Parliament in 1880.[26] Between 1885 and 1889, Bell set up subsidiaries in Prince Edward Island, Nova Scotia, and New Brunswick, although

these were to become regulated by provincial public utilities commissions. In 1907 and 1908, the three prairie provinces set up government-owned telephone companies and acquired Bell's assets in their territories. B.C. Tel effectively came under federal regulation in 1916.

As Robert Buchan and Christopher Johnston point out, "the pre-eminent case relating to jurisdiction over telephone facilities and services is *Toronto Corporation* v. *Bell Telephone Company of Canada*,[27] which was decided by the Judicial Committee of the Privy Council in 1905." Buchan and Johnston continue, "It held that Bell Canada's local and long-distance functions did not constitute separate and distinct undertakings for regulatory purposes. . . ."[28] In doing so, the Privy Council "confirmed federal jurisdiction over all aspects of Bell's telephone operations, which had been declared by Parliament to be 'works for the general advantage of Canada' pursuant to section 92(10)(c) of the British North America Act."[29]

What is remarkable about this ruling is that neither the federal nor any provincial government has sought to "precipitate a judicial resolution of the constitutional legal issues relating to jurisdiction over those interconnected telecommunications undertakings that provide both intraprovincial and interprovincial telecommunications services using common interconnected facilities."[30] This description applies to each of the ten members of TCTS. Note that three are federally regulated (Bell, B.C. Tel, and Telesat Canada), six are regulated by a provincial utilities commission, and one is regulated by the Cabinet of a province. Of the seven provincially regulated companies, four are investor owned.

The failure to seek resolution of the constitutional position of the two levels/orders of government is remarkable for two reasons. First, for all their alleged aggressiveness in "intruding" into matters of provincial jurisdiction, the federal government would appear to have a strong claim to exclusive federal jurisdiction over all interprovincial telephone and telegraph services and over all interconnected systems and facilities that provide such services. Secondly, judicial clarification has been sought in many other areas: broadcasting, transportation, labour relations, fisheries, energy, and natural resources.[31]

Why have both sides forsworn constitutional jousting? Buchan and Johnston offer the following explanation: "both sides have grave and well-founded reservations as to the desirability of the jurisdictional and regulatory framework that might be imposed if such a court challenge were sustained."[32] In their view, the result would be either exclusive federal jurisdiction or a two-tier regime of divided jurisdiction as has been applied to fisheries, highway transport, and non-nuclear forms of energy.

What is more remarkable is the fact that privately owned telephone companies have not sought to upset the constitutional applecart. But

the fact that they have not may be less surprising when we realize that until the last decade or so, the hand of both federal and provincial regulation has been rather light.[33] Moreover, more than one half of the TCTS member companies' revenues (i.e., intra- and interprovincial toll revenues) had been effectively exempt from regulatory scrutiny until 1978 when the CRTC announced it would examine TCTS rates.[34] Any pressures placed on the telephone companies by either the federal or provincial regulators were subject to a very large safety valve.

A major constitutional case is more likely in the 1980s because of three factors: the increased stringency of rate-of-return regulation in the face of rising inflation, regulatory review of TCTS's toll rates and settlements procedures, and the liberalization of terminal attachment and system interconnection rules that has increased the pressures of competition.

Technological and Economic Change

The telecommunications industry has been in the throes of a technological revolution for at least the last decade. Irwin and Janisch state that we are moving to an "information economy" the technology of which they describe as follows:[35]

— Information technology is multidisciplinary, multi-industry, multi-governmental, and multinational.
— Information products are characterized by miniaturization, incredible speed, and dramatic cost reductions.
— Smart or intelligent products that store, process, and transmit information are becoming very widely available as costs fall and new producers compete.
— New sellers and new products are generating an explosion of information distribution systems within and between firms, locally to internationally.
— Actual or potential entry to communications markets will make a fundamental shift in industry structure.
— Boundaries separating diverse industries, products, and services are softening and withering under technological assault.
— The rate of technological change, while uneven, is very high compared to most sectors of the economy.

So far, Canada's telecommunications regulators and policy makers have not welcomed this "technological nightmare of opportunity."[36] On the other hand, we can point to a number of decisions that have loosened the regulatory bonds on what have long been monopoly enterprises. The CRTC[37] and some of the provincial regulators[38] have permitted terminal attachment in the form of automatic radiotelephone equipment and subscriber-owned telephones and related PBX equipment. CNCP, which provides long-distance, non-voice (data) transmission, has been permitted by the CRTC to interconnect

into Bell Canada's system.[39] Some provinces have also permitted such system interconnection.[40]

On the other hand, we can point to less attractive regulatory or policy decisions: the acquisition and vertical integration of AEL Microtel by B.C. Tel;[41] the permission granted by Cabinet to Telesat Canada to join TCTS, thereby ensuring a complete monopoly on long-distance voice transmission for TCTS member companies;[42] the proposal to regulate the telephone companies' tariffs on so-called competitive services;[43] and the decision to permit the largest cable television operator to acquire the second largest cable television firm in Canada, giving the merged entity almost 28 per cent of all subscribers in the most intensively cable-wired nation in the world.[44]

The primary effect of the technological revolution is that it makes competition both possible and desirable. The natural monopoly for long distance is no more.[45] It may even have passed for local exchange service.[46] With the end of the natural monopoly conditions, a fundamental basis for regulation has evaporated. The problem, however, is that the other rationales for regulation were invented to buttress that of natural monopoly. Two stand out: "taxation by regulation" or regulation to effect a redistribution of income among classes of buyers of the regulated services; and regulation to ensure sovereignty, cultural identity, and national unity objectives.

In addition to these barriers to greater competition there is the deeply ingrained predilection of Canadians favouring government intervention.[47] This is reinforced by Canadians' lack of enthusiasm for competition as a vital force in economic (and social) life.

The most important barrier to less regulation and more competition is the widespread practice of cross-subsidization. For example, Bell Canada estimates that in 1980 the costs of local exchange service exceeded revenues from the flat-rate monthly billings by $710 million.[48] This was made up largely by toll revenues that exceeded the estimated costs of providing such service by $725 million. Bell calculates that each $1 of toll revenues costs only $0.43 to produce. On the other hand, local services cost $1.84 to produce each $1 of revenue.[49]

Schultz shows that intra- and interprovincial toll revenues are particularly important to the government-owned prairie telecos, amounting to 60–67 per cent of their operating revenues.[50] Not surprisingly, it is these companies/provinces that are most adamant that low local rates must be maintained. They are now being maintained by high toll rates. If entry was permitted into the long-distance market (this has already occurred in the United States),[51] toll rates *might* fall by 50 per cent while the monthly rate for local service would have to increase by at least one third.[52] Fuss and Waverman's analysis of Bell Canada indicates that *marginal* cost

pricing would result in an increase of 70 per cent in the price of local service and declines of 70 and 50 per cent in monopoly toll rates and competitive toll rates (e.g., for data) respectively.[53]

Barry Lesser argues that from the point of view of encouraging competition, the assignment of greater regulatory and policy authority to the federal government is justified.[54] Yet, it is the federal government that has sought to restrict the reception of broadcasting signals directly from satellites in the name of Canadian content, cultural, and unity objectives.[55] With the era of the cheap and small roof-top/backyard receiving dish, any regulator's hopes of controlling such reception are doomed. The technology seems to be making its own rules to a very large extent.

More generally, there is severe doubt that traditional public utility regulation, regardless of which government has jurisdiction, can survive the gales of technological change.[56] In a decade or so we may well think of the present constitutional fight over telecommunications as we do of King Canute's efforts to command the tides. This is not to say that the federal government will not exercise a range of governing instruments other than traditional public utility regulation to seek its bedrock objectives concerning sovereignty, identity, and unity.[57] Similarly, the thrall of province building is unlikely to pass quickly, and therefore provincial governments can be expected to try to exercise substantial control over telecommunications. As a result, we are unlikely to have a barrier-free common market in telecommunications services.

Appraising the Federal and Provincial Proposals

Professor Lesser uses the Breton-Scott model to assess some of the economic consequences of assigning the regulation of telecommunications to either the federal or provincial governments. Four types of organizational costs are identified: administrative (the budgetary outlays of governments on regulatory activities); co-ordination (the costs of handling intergovernmental activities); signalling (the costs associated with citizens making their preferences known to governments); and mobility costs (citizens' costs in moving to the preferred jurisdiction).[58]

Minimizing these organizational costs is only one element in either side's objective function. Politicians' and bureaucrats' non-economic preferences for constitutional allocation matter a great deal. Telecommunications is only one "bargaining chip" in the larger game of constitutional negotiations. (And that game has not ended with the arrival of the new Constitution in Canada in April 1982.) In addition, there are costs, perhaps substantial costs, involved in reassigning powers between the two levels/orders of government.

Lesser finds that the organizational costs of exclusive jurisdiction rested in the federal government would be less than exclusive provincial jurisdiction over telecommunications. He also concludes that "a complete federal assignment is qualitatively superior" to both a complete provincial assignment or concurrent jurisdiction. In terms of organizational costs, concurrent jurisdiction is "quite likely to represent a lower-cost solution than a complete provincial assignment."[59]

It is important that a political scientist, two lawyers, and an economist all find the federal and provincial proposals of August 1980 distinctly unsatisfactory. Lesser, the economist, notes that "basically, the provinces' proposal is insufficiently concerned with costs, while the federal proposal is insufficiently concerned with provincial politicians' preferences."[60] In particular, Lesser argues that the provinces' guarantee of the free flow of information is "too weak to offer any real guarantee against such disruption." On the other hand, the federal proposal's joint regulatory board "is an inadequate means of providing the provinces with an effective vehicle for expressing their concerns regarding interprovincial services and related matters."[61] Under the federal proposal, a majority of the members of the joint board would be federal nominees.

Buchan and Johnston established four criteria by which to assess the two proposals:[62]

- Do they balance the interests of both levels of government in a federal system?
- Are the powers granted sufficiently complete to allow each level of government to regulate fully in its own sphere?
- Are the respective spheres of authority clearly enough delineated so as to avoid overlapping or conflicting regulation?
- Are the proposals likely to lead to consistent, fair, and efficient regulation to the benefit of all interest groups?

They conclude that neither proposal is satisfactory when measured against these criteria, although the federal proposal comes closer to meeting the tests set out above than does the provincial "Best Efforts Draft."

Buchan and Johnston imply that their assessment of the two August 1980 proposals has increased their respect for the existing regulatory structure, "warts and all." In their view, it has produced a "comprehensive, varied, and efficient telecommunications system that is responsive to both local and national needs."[63]

Schultz starts from the principle that "both levels of government have legitimate interests that must be respected if there is to be a mutually satisfactory allocation of responsibilities."[64] He finds that the federal government has a justifiable interest in maintaining a

nationally integrated telecommunications system and in resolving the inevitable conflicts in maintaining such a system. He also accepts the validity of provincial concerns relating to the present and proposed pricing structure of telecommunications services. Schultz, it is fair to say, is rather more sympathetic to the provincial position than are either Lesser or Buchan and Johnston. In his view, "regulatory responsibilities should be allocated in such a way that permits the maximum degree of freedom possible for individual provinces to pursue what they perceive to be their telecommunications objectives while providing for the protection of, and the means to attain, national objectives."[65]

Schultz notes that not only do the provinces reject the federal allocation of powers, but so do all the carriers, because of the inefficiency of two-tier regulation. The spectre of the U.S. experience is raised. In short, Schultz finds that the federal proposal of August 1980 "has little to commend it for serious discussion." At the same time, he concludes, "the provincial proposal is as flawed as the federal."[66] For example, the provinces "refuse to recognize that the federal government has legitimate interests in the development and performance of the telecommunications system." Moreover, their proposal "fails to substitute, with one exception, any national decision-making alternative."[67] The exception, dealing with the free flow of information, is itself "highly objectionable."

In conclusion, the authors of each of the three major papers are unimpressed by the proposals of either level of government. The stage is set, therefore, to see if they can do better.

Toward a New Solution

The federal and provincial proposals of August 1980 concerning the allocation of regulatory powers over telecommunications have been found wanting on a variety of dimensions. Most importantly, they are mutually unacceptable to the governments directly involved. But because the problem *is* a difficult one, it seems clear that each of the analysts in this volume now finds more to admire in the existing, admittedly ungainly, system. They do, however, offer proposals designed to improve on the existing system.

We have summarized the essential characteristics of each of the authors' proposals in Table 1. Several points should be noted about these proposals. First, all four proposals seek changes that will not require constitutional amendments. Gregory Kane's proposal[68] (and perhaps Lesser's) would not even require new legislation. Secondly, Schultz and Buchan and Johnston propose a new joint regulatory board to deal with interprovincial and international rates, services, interconnection, attachment, and so forth. Kane proposes a joint panel that would operate on an *ad hoc* basis using members of existing

Table 1
SUMMARY OF PROPOSALS FOR ALTERING JURISDICTION FOR TELECOMMUNICATIONS REGULATION

Characteristics	Schultz	Buchan & Johnston	Lesser	Kane
Type	Joint regulatory board (no constitutional amendment)	Joint regulatory board (no constitutional amendment)	Joint policy board (no constitutional amendment)	Joint panel (no constitutional amendment)
Legislative Authority	• federal • to contain a statement of national telecommunications principles	• federal • to contain a set of national telecommunications policy objectives, preferably agreed to by both levels of government	• not stated, probably not required	• not required • use a formal federal-provincial agreement including the relevant regulatory agencies
Responsibilities	• regulate interprovincial and international rates and services including system interconnection • regulate present federal carriers, i.e., CNCP, Telesat, Teleglobe • regulate terminal interconnection of network-addressing equipment • regulate interprovincial aspects of cable television • provinces to regulate intraprovincial rates and services. (This would require a transfer of jurisdiction of certain carriers, e.g., Bell Canada, B.C. Tel.)	• approval of rates for services linking two or more provinces • approve connecting agreements between systems linking two or more provinces • regulate new entry offering services extending beyond a single province • regulate terminal interconnection of network-addressing equipment • establish a uniform system of costing and accounting • CNCP, Telesat and Teleglobe to come under joint board • provinces to regulate intraprovincial rates and services	• recommend policy governing intraprovincial, interprovincial and international telecommunications including that concerning "message creation" and redistribution of programming signals • recommendations would be subject to ratification by all 11 governments, but in case of interprovincial or international services the provinces could only accept or reject, but not vary the recommendations • the federal government would have authority to enact laws, which would be paramount, in respect to *intra*provincial services when the policies have been recommended by the joint policy board and at least two thirds of the provinces have accepted the recommendation	• power to make recommendations only to existing federal and provincial regulatory agencies. They must make the decision and implement it • deal with agreed issues which, by design or effect, affects two or more jurisdictions where a regulatory authority is exercised over telecommunications. This would include systems interconnection, terminal attachment, adjacent revenue settlements, principles of regulation, costing methodologies and matters where jurisdiction is contested

			• the federal government would have authority to enact legislation which shall prevail over all provinces when interprovincial or international services are involved *and* where the legislation embodies policies recommended by the joint board • federal government would have exclusive jurisdiction over technical matters concerning management of the radio spectrum, space aspects of communications satellites and telecommunications for aeronautics, defence, etc.	
Appeals and Policy Directives	• policy directives could be made by the federal government following the required consultation with provinces • appeals to federal Cabinet following the required consultation with provinces	• mechanism for internal review by whole board as per CRTC and CTC presently; similar criteria for review • normal rights of judicial review under the Federal Court Act • no appeal to Cabinet • policy directives after required consultation with the provinces and public	• See "Responsibilities"	• appeals would be pursuant to the decisions of the participating regulatory agencies
Membership	• majority of provincial nominees who would be chairmen or designates of provincial regulatory agencies • operate in panels of 3; 2 provincial, 1 federal if 2 provinces involved; increase the size of the panel if more provinces were involved	• 9 members, 6 of whom would be drawn from chairmen or vice-chairmen of provincial agencies who would sit on both bodies. They would be part-time members • the 3 federal representatives would be full-time, one of whom would be chairman	• 13 members; 1 from each province and 3 federal representatives • to operate by a simple majority voting rule	• the number of representatives on a particular panel would depend upon the number of regulatory agencies affected; several jurisdictions could agree to send the same representative • one regulatory agency would be characterized as the "host" agency for each particular hearing

regulatory agencies. The panel could only make recommendations, not decisions binding on the actors involved. Lesser proposes a joint policy board, somewhat like Kane's, but providing for legislative implementation of the recommendations depending on the size and characteristics of the majority making the recommendations.

Thirdly, under the Schultz and Buchan and Johnston proposals, the federal government would cease to have its own regulatory tribunal. Instead, carriers presently subject exclusively to federal regulation would come under the new joint board, a majority of whose members would be drawn from provincial regulatory agencies. Fourthly, in all four proposals, the provinces would retain exclusive jurisdiction of intraprovincial matters, although Lesser proposes that the federal government could enact paramount legislation regarding intraprovincial telecommunications issues where two thirds of the provinces have accepted the recommendations of the joint policy board.

Fifthly, Schultz and Buchan and Johnston differ importantly on the matter of appeals. Schultz provides for both policy directives and appeals to the federal Cabinet, in both cases following mandatory consultation with the provinces. Buchan and Johnston would not permit appeals to the Cabinet, but would allow federal policy directives and only after allowing for representations from the public and consultation with the provinces. Sixthly, Kane's proposal, unlike the other three, does not contain any mechanism for finally resolving conflicts among federal and provincial regulatory agencies. It is heavily dependent upon a spirit of good will and co-operation. For example, if the joint panel recommends system interconnection on a highly permissive basis, but one or two provinces refuse to go along, the efficiency of the Canadian telecommunications services industry could be severely impaired. While Lesser provides for federal legislation to implement the recommendations of his joint policy board, such legislation would only be paramount if it dealt with interprovincial or international rates and services, or, in the case of intraprovincial matters, two thirds of the provincial representatives on the board recommended the policy. Since the board will be comprised of ten provincial and three federal representatives, even a simple majority requires four provinces to join the three federal representatives to legislate on what now clearly appear to be matters of federal jurisdiction exclusively.

In summary, adoption of any of the four proposals would move the provinces toward their position as defined in August 1980. In each case, the federal government would be agreeing to share power over matters hitherto thought to be exclusively within their purview. It seems that "triumphs" of Canadian federalism almost always involve a decline in the effective legislative authority of the federal government. Fulfilling the aspirations of the provinces, even those that

Schultz describes as the "legitimate aspirations of the provinces," comes at the expense of federal power. It is not clear why the federal government should wish to adopt such a solution.

Notes

[1] Statistics Canada, *Telephone Statistics, 1980*, Cat. No. 56-203; and *Telecommunications Statistics, 1980*, Cat. No. 56-201 (Ottawa: Minister of Industry, Trade and Commerce, 1981). The operating revenues of the telephone industry in 1980 were $5.85 billion. However, this figure excludes CNCP Telecommunications, Telesat Canada, and Teleglobe.

[2] Statistics Canada, *Cable Television, 1980*, Cat. No.(Ottawa: Minister of Industry, Trade and Commerce, 1981).

[3] See, for example, "6 Companies Given Licences for Pay-Television Networks," *Globe and Mail* (19 March 1982), pp. 1-2. It is expected that the new service will go into operation in April 1983.

[4] Statistics Canada, *Radio and Television Broadcasting, 1980*, Cat. No. 56-204 (Ottawa: Minister of Industry, Trade and Commerce, 1981). The total operating revenues of public and private radio and television broadcasters in 1980 were $1,063.4 million. However, the CBC, which is included in this figure, had expenditures of over $500 million more than its revenues of $104 million.

[5] See, for example, S. Serafini and M. Andrieu, *The Information Revolution and Its Implications for Canada* (Ottawa: Minister of Supply and Services Canada, 1981). A recent newspaper story states that the interconnect market is expected to be $2 billion by 1986 as opposed to about $500 million in 1982. See J. Chevreau, "CP Ltd. and CN After Market in Interconnects," *Globe and Mail* (27 February 1982), p. B2, and "Baby Bell Is Healthy, Growing," *Globe and Mail* (12 April 1982), p. B3.

[6] R. Schultz, "Partners in a Game Without Masters: Reconstructing the Telecommunications Regulatory System," in *Telecommunications Regulation and the Constitution* (Montreal: The Institute for Research on Public Policy, 1982), p. 50.

[7] A.C. Cairns, "The Governments and Societies of Canadian Federalism," (1977), 10 *Canadian Journal of Political Science* at 708.

[8] See, for example, Economic Council of Canada, *Reforming Regulation* (Ottawa: Minister of Supply and Services Canada, 1981), Ch. 5.

[9] See the discussion in Schultz, *supra*, note 6, and in R.J. Buchan and C.C. Johnston, "Telecommunications Regulation and the Constitution: A Lawyer's Perspective," in *Telecommunications Regulation and the Constitution* (Montreal: The Institute for Research on Public Policy, 1982).

[10] Schultz, *supra*, note 6 at 50.

[11] See CRTC Telecom Public Notice 1978-18 and CRTC Telecom Decision 81-13 (7 July 1981). This decision dealt with tariffs and rules concerning access to satellite transmission. Note the decision was appealed to the federal Cabinet — and varied on four points. Under Telecom Decision 81-13, the CRTC ruled that broadcasters as well as cable television operators will now be able to deal directly with Telesat Canada to lease satellite transponders for full-time or occasional use. However, the Cabinet (PC 1981 — 3456, 8 December 1981) ordered that those who make use of only part (mostly business users) of a satellite channel will have to deal only through approved common carriers, i.e., TCTS members, CNCP and fifteen other approved common carriers. The effect will be to increase competition between CNCP and TCTS.

On the other hand, the Cabinet upheld the CRTC's decision requiring a reallocation of toll revenues among TCTS members. See J. Chevreau, "Fox Varies CRTC Satellite Decision," *Globe and Mail* (11 December 1981); J. Chevreau, "Telesat Expects Little Change in Service for Broadcasters," *Globe and Mail* (21 December 1981), p. B1.

[12] See, for example, R. Bird, *Financing Canadian Government: A Quantitative Overview* (Toronto: Canadian Tax Foundation, 1979), Ch. 5.

[13] Schultz, *supra*, note 6 at 57.

[14] Minister of Communications, *Proposals for a Communication Policy for Canada* (Green Paper) (Ottawa: Information Canada, 1973).

[15] See, Schultz, *supra*, note 6 at 59.

[16] Minister of Communications, *Communications: Some Federal Proposals* (Grey Paper) (Ottawa: Information Canada, 1975).

[17] Schultz, *supra*, note 6 at 60.

[18] Details can be found in the public announcement of the federal minister of communications, Ottawa, 10 November 1975.

[19] See H.N. Janisch, "Policy Making in Regulation: Towards a New Definition of the Status of Independent Regulatory Agencies in Canada," (1979), 17 *Osgoode Hall Law Journal* 46.

[20] CRTC Telecom Decision 77-11 (7 October 1977). A useful discussion of this decision and others relating to the liberalization of telecommunications regulation can be found in G.E. Kaiser, "Competition in Telecommunications: Refusals to Supply by Regulated Common Carriers," in P. Grant ed., *New Developments in Canadian Communications Law and Policy* (Toronto: Law Society of Upper Canada, 1980).

[21] CRTC Telecom Decision 79-11 (17 May 1979). Bell Canada, supported by the provinces, unsuccessfully appealed this decision to the Cabinet.

[22] See note 11 above.

[23] Schultz, *supra*, note 6 at 64.

[24] *Ibid.* at 64.

[25] The federal position is set out in Appendix C, while the consensus position of the provinces can be found in Appendix D to this volume.

[26] The details in this paragraph are taken from Buchan and Johnston, *supra*, note 9. More details on the origins of federal regulation can be found in C. Baggaley, "Belling the Cat: The Art of the Possible and the Introduction of Federal Regulation in Canada, 1880-1910," (Unpublished paper prepared for The Institute for Research on Public Policy, August 1981).

[27] [1905] A.C. 52 (P.C.).

[28] Buchan and Johnston, *supra*, note 9 at 119.

[29] *Ibid.*

[30] *Ibid.*

[31] These points are made by Buchan and Johnston, *supra*, note 9 at 119.

[32] *Ibid.* at 119-20.

[33] See L. Waverman, "The Process of Telecommunications Regulation in Canada," Regulation Reference Working Paper No. 28 (Ottawa: Economic Council of Canada, 1982). It appears that Bell Canada did not bring a rate case between 1927 and 1949.

[34] See CRTC Telecom Decision 81-13 (7 July 1981). The decision was appealed to the Cabinet. On 8 December 1981, under PC 1981-3456, the Cabinet varied the decision by setting aside that part of it which disallowed item 2.6 of the proposed tariff and directed Telesat to refile the tariff item without limitation to its customer base. In general, however, the CRTC decision concerning TCTS rates and revenue settlements was affirmed. See 2 C.R.R., 3-57 and the discussion in note 11 above.

A recent book on Japanese management provides some additional insight into the uses of ambiguity: "In organizations there are several conditions in which vagueness

may be desirable or intentional: vagueness in *intention* itself (reserving decision on what course of action one might pursue) . . . ; in *relation* (in the connection of one person to another, of facts to conclusion, or cause to effect, etc.); and in *communication* (obscuring the messages sent between persons)." The authors contrast Western and Japanese attitudes toward ambiguity as follows: "More ambiguity, uncertainty and imperfection in organizations is acceptable to them than to us as an immutable fact of life, what philosophers in the West have called 'existential givens'. By this they mean that such conditions just *are*, and, accordingly, the sooner we accept that they exist the better things will go." See R.T. Pascale and A.G. Athos, *The Art of Japanese Management* (New York: Warner Books, 1982), at 140–41.

[35] M.R. Irwin and H.N. Janisch, "Information Technology and Public Policy: Regulatory Implications for Canada," (Paper presented at the Symposium on Regulatory Reform, organized by the Law and Economics Programme, University of Toronto Faculty of Law, Alton, Ont., 28–30 October 1981, mimeo). More generally, see M.R. Irwin, "Technology and Telecommunications: A Policy Perspective for the 80s," Regulation Reference Working Paper No. 22 (Ottawa: Economic Council of Canada, 1981).

[36] This phrase is David MacDonald's as quoted in Schultz, *supra*, note 6.

[37] See CRTC Telecom Decision CRTC 77–11 (7 October 1977) (*Challenge Communications*); upheld by the Federal Court of Appeal (1978) 86 D.L.R. (3d) 351, and Leave to Appeal to the Supreme Court of Canada was refused. See also CTC Order T–658, 22 May 1975 (re *Harding Communications*) and subsequent court cases: (1975) Quebec S.C. 1116; (1977) Quebec C.A. 56; (1979) 1 S.C.R. 395. See also the radio common carriers case, *Colins Inc. et. al.* v. *Bell Canada*, CRTC Telecom Decision 79–12 (7 June 1979) and CRTC Telecom Decision 79–14 (26 July 1979). See also the CRTC's Interim Decision on Terminal Attachment re Bell Canada, Telecom Decision 80–13 (5 August 1980) (Summarized in 1 C.R.R. B90). This decision permitted the attachment of subscriber-owner single line telephones, key systems, and PBXs subject to certain technical and other conditions. The CRTC made a similar decision (#81–19) concerning B.C. Tel on 22 October 1981, following the application of a company wanting to sell subscriber-owned telephone sets. Subsequently all other federally regulated telephone companies were joined into the Bell case. For a negative view of the effects of permitting attachment, see L. Verschelden, "The Attachment of Subscriber Provided Terminal Equipment," (Canadian Federation of Communications Workers, August 1980, mimeo).

[38] See the eventually favourable ruling by the P.E.I. Supreme Court, 17 June 1981, summarized in 2 C.R.R. 3–43. This is the *Garden of the Gulf Court and Motel* case. Recently, Alberta Government Telephones applied to the Alberta Public Utilities Board, for an order approving the transfer of voice terminal equipment from the regulated intraprovincial basic services category to unregulated non-basic services, 16 February 1981. In a very surprising decision, the PUB refused to approve A.G. Tel's request for mandatory subscriber ownership of terminal equipment by *both* business and residential customers. See Decision No. E81235 (22 December 1981); 2 C.R.R., 2–376.

[39] See note 21 above.

[40] See Alberta Public Utilities Board, *Telecommunications Inquiry Report No. E80111* (1 September 1980), and for a Nova Scotia decision that authorized the interconnection of a radio paging network to Maritime Tel and Tel's system, see 2 C.R.R., 1–150. Sask Tel sought and obtained legislation (Bill C–13) in 1980 that blocks the attachment of subscriber-provided equipment and system interconnection without the permission of the government-owned utility. See *The Public Sector* (7 July 1980), p. 3. The Saskatchewan minister of telephones emphasized that system interconnection such as that sought by CNCP would result in "cream skimming" of the profitable segments of the market, leaving the rural areas to Sask Tel.

[41] CRTC Telecom Decision 79–17 (18 September 1979).

[42] See CRTC Telecom Decision 77–10 (24 August 1977); (1977) 3 C.R.T.C. 265 as varied by Order in Council PC 1977–3152 (1 November 1977).

[43] See the decision for Phase II of the CRTC's Cost Inquiry, Telecom Decision 79–16 (28 August 1979).

[44] Canadian Cablesystems Ltd. of Toronto obtained control of Premier Communications Ltd. of Vancouver for $86.5 million. The new entity wil have 17 cable systems including 72 per cent of cable subscribers in Vancouver, and 51 per cent in Toronto. See B. Kirby, "CRTC Approves Takeovers of Two Cable TV Companies," *Globe and Mail* (31 July 1980), p. B2. More generally, see D. MacFarlane, "The King of Cable," *Saturday Night* (February 1981), pp. 39–45.

[45] See M. Fuss and L. Waverman, *The Regulation of Telecommunications in Canada*, Regulation Reference Technical Report No. 7 (Ottawa: Economic Council of Canada, 1981).

[46] See, for example, M.R. Irwin, "Local Networks in the United States: Technology vs. Regulation," (paper presented at the IDATE International Congress, Montpellier, France, 26 October 1981); J.R. Meyer *et al.*, *The Economics of Competition in the Telecommunications Industry* (Cambridge, Mass.: Oelgeschlager, Gunn, and Haen, 1980); and "Dialling Locally — Without AT&T," *Business Week* (5 October 1981), pp. 102, 106.

[47] See J.L. Howard and W.T. Stanbury, "Measuring Leviathan: The Size, Scope and Growth of Governments in Canada," (paper presented at the University of Lethbridge Conference, "Governments and the Market Economy," 1–2 April 1982).

[48] Bell Canada, "Report on the 5-Way Split Study of 1980," (25 May 1981, mimeo), p. 2. In 1981 both of these amounts exceeded $1 billion. See *Globe and Mail* (22 May 1982), p. B1.

[49] *Ibid.*

[50] Schultz, *supra*, note 6 at 71.

[51] The leading firm is MCI Communications Corp.

[52] The price elasticity of demand for long distance is much greater than that for local service.

[53] Fuss and Waverman, *supra*, note 45.

[54] B. Lesser, "The Implications of the Federal and Provincial Proposals for Regulating Telecommunications: An Economist's Perspective," in *Telecommunications Regulation and the Constitution* (Montreal: The Institute for Research on Public Policy, 1982), at 205.

[55] See, for example, T. Barrett, "Technology Outpacing Politicians Framing Communications Laws," Vancouver *Sun* (3 November 1980); *Globe and Mail* editorials (8–9 July 1980), "Pie from the Sky," and "Poor Stuff, But Our Own"; J. Lyon, "Meisel Message: Stop Poaching TV," *Financial Post* (7 June 1980), p. 5; T. Barrett, "Licence Means McGeer's not a Pirate," Vancouver *Sun* (4 June 1980), p. A13 (and 3 June 1980, p. A17); "He's Got the Whole World in His Dish," *Globe and Mail* (10 June 1980), p. 6; "B.C. Satellite 'Theft' Old Hat in the Wild," Montreal *Gazette* (4 June 1980), p. 41; G. Oake, "TV 'Dishes' Could Cook Up Revolt in North," Montreal *Gazette* (4 June 1980), p. 41.

[56] The most obvious example is the proposed Consent Order in the U.S. under which AT&T will "spin off" its twenty-two local operating companies. See *U.S.A.* v. *Western Electric Company Inc. and American Telephone and Telegraph Company*, Civil Action 17–49, "Modification of Final Judgment," (Draft January 1982), U.S. District Court (New Jersey). More generally, see "Stalking New Markets: A Slimmer AT&T Will Compete Fiercely in the World of High Technology," *Time* (25 January 1982), pp. 52–55.

[57] See, for example, Consultative Committee on the Implications of Telecommunications for Canadian Sovereignty, *Telecommunications and Canada* (Ottawa: Minister of Supply and Services Canada, 1979).

[58] Lesser, *supra*, note 54 at 177–78. The Breton-Scott model is contained in A. Breton and A.D. Scott, *The Economic Constitution of Federal States* (Toronto: University of Toronto Press, 1978); and A. Breton and A.D. Scott, *The Design of Federations* (Montreal: The Institute for Research on Public Policy, 1980). Signalling costs are analogous to the "voice" option and mobility costs are analogous to the "exit" option in A.O. Hirschman, *Exit, Voice and Loyalty* (Cambridge, Mass.: Harvard University Press, 1970).

[59] Lesser, *supra* note 54 at 188.

[60] *Ibid.* at 202.

[61] *Ibid.* at 201.

[62] Buchan and Johnston, *supra* note 9 at 138–39.

[63] *Ibid.* at 152.

[64] Schultz, *supra*, note 6 at 90.

[65] *Ibid.* at 92.

[66] *Ibid.* at 95.

[67] *Ibid.* at 95.

[68] T.G. Kane, "Breaking an Impasse: A Joint Panel Proposal for Telecommunications Regulation," in *Telecommunications Regulation and the Constitution* (Montreal: The Institute for Research on Public Policy, 1982).

Partie I

La réglementation des télécommunications et la constitution : les grands thèmes

W.T. Stanbury

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Cette introduction veut permettre d'identifier certains des grands thèmes des textes de ce livre et d'en discuter brièvement. En premier lieu, nous soulignons l'importance de l'enjeu pour les principaux acteurs sur la scène de la réglementation des télécommunications au Canada. Deuxièmement, nous situons le conflit constitutionnel au sujet des télécommunications dans le contexte du vaste conflit fédéral-provincial portant sur toute une gamme de sujets. Troisièmement, nous décrivons l'ambiguïté qui entoure les revendications constitutionnelles des gouvernements tant fédéral que provinciaux quant aux compétences en matière de télécommunications. Quatrièmement, nous examinons l'importance des changements technologiques et économiques pour la réglementation des télécommunications et pour les prétentions concurrentes en matière de compétence. Cinquièmement, nous faisons valoir que tous les auteurs de ce livre concluent que les propositions tant fédérale que provinciale de septembre 1980 relativement à la répartition des pouvoirs en matière de télécommunications présentent de graves lacunes à plusieurs points de vue. En dernier lieu, nous examinons les différentes solutions proposées par les auteurs dans le but d'en arriver à un règlement du conflit : une commission conjointe, une table ronde ou un organisme de réglementation.

L'importance des intérêts en jeu

En règle générale, les différends sont plus prononcés lorsque l'on juge que l'enjeu est plus important. Dans un pays aussi vaste et diversifié que le Canada, les questions relatives aux télécommunications prennent une importance remarquable. L'industrie des télécommunications est très importante tant d'un point de vue économique que politique. Le Canada est un des pays les plus « câblés » au monde : 99 % des ménages ont au moins un appareil téléphonique; 97 % ont un téléviseur ou plus (la moitié étant reliés à un système de télédistribution); et plus de 98 % des ménages ont au moins un poste radio.

Le gouvernement fédéral et le gouvernement du Québec, en particulier, considèrent la mainmise sur les télécommunications comme partie intégrante de leurs activités d'« édification nationale » en termes de souveraineté, d'identité culturelle et d'unité. Le projet de loi fédéral sur les télécommunications (Bill C–16) de 1979 renvoie à des mesures destinées à « sauvegarder, enrichir et renforcer le tissu culturel, politique, social et économique du Canada ». Les télécommunications doivent servir à renforcer les liens au sein de toutes les régions du Canada et entre elles. On insiste sur la propriété, la réglementation et le contrôle national des réseaux et des services de télécommunication. Dans les provinces des Prairies, qui sont aussi propriétaires de leurs propres compagnies de téléphone, on s'intéresse particulièrement au recours à la réglementation pour assurer la

subvention du service local à tarif fixe aux dépens du service interurbain à tarif variable. (Nous traiterons plus en détail de cette question ci-dessous.) À l'heure actuelle, les revenus des principales compagnies de téléphone du Canada (y compris Télésat, Téléglobe et les Télécommunications CNCP) dépassent 6 $ milliards[1]. Les revenus des télédistributeurs représentent un autre 350 $ millions par année[2] — et ce total ne comprend évidemment pas la télévision payante à laquelle le CRTC vient tout juste de donner le feu vert[3].

Malgré l'ampleur de ces chiffres, ils ne témoignent pas tout à fait de l'importance économique du secteur des télécommunications, et ce pour plusieurs raisons. Tout d'abord, en est exclue la radiodiffusion (les revenus de la radio et de la télévision s'élèvent à plus d'un milliard de dollars)[4]. Deuxièmement, elles ne tiennent pas compte des activités des fabricants de matériel de télécommunication. Troisièmement, et principalement, les chiffres ne laissent aucunement entrevoir ce que plusieurs observateurs croient être les imposantes possibilités économiques offertes par la prochaine « société de l'information »[5].

Le recours possible à une politique des télécommunications pour atteindre une grande variété d'objectifs dans d'autres secteurs, tels que les banques, l'édition et la fabrication, confère à la politique des télécommunications une plus grande importance qu'elle n'en aurait autrement. En outre, les politiques qui font appel aux télécommunications représentent des instruments précieux pour toute sorte d'activités d'« édification provinciale ».

Les relations fédérales-provinciales

Le professeur Richard Schultz nous rappelle que la « question politique quintessentielle » est de savoir « qui décidera » de notre politique en matière de télécommunications ou des mesures qui viseront les télécommunications[6]. Pourtant, comme le remarque Alan Cairns, « le fédéralisme canadien contemporain porte sur les gouvernements »[7]. Il s'ensuit que les conflits entre gouvernements pourraient sacrifier les intérêts du régime aux intérêts des gouvernements eux-mêmes. Les gouvernements ne s'engagent pas dans une lutte de compétence en vue de *ne pas* faire appel à leur pouvoir pour influencer le comportement des acteurs du secteur privé ou du secteur public subordonné. Tandis que les deux niveaux (ou ordres) luttent pour savoir *qui* réglementera, les intérêts qu'ont les consommateurs et les producteurs à voir une diminution générale de la réglementation de l'État[8] sont oubliés.

Il est intéressant de remarquer que notre système complexe, digne de nos meilleurs « patenteux », de réglementation fédérale et provinciale des sociétés exploitantes publiques, privées et mixtes[9] n'a pas fait l'objet de différends fédéraux-provinciaux avant les années 1970. M. Schultz souligne que, « auparavant, la plupart, sinon toutes, les

décisions en matière de télécommunications relevaient du secteur privé, le gouvernement jouant un rôle de second plan »[10]. Il n'y a qu'à songer à la création du Réseau téléphonique transcanadien (RTT) en 1931 et au fait que les tarifs interprovinciaux fixés par un accord unanime dans le cadre de ce réseau n'ont fait l'objet d'aucune réglementation jusqu'à la fin des années 1970[11].

La décentralisation fiscale[12] s'est accompagnée d'une augmentation des prétentions provinciales à une plus grande autonomie et de la consultation relative à ce qu'on avait considéré auparavant comme des questions purement fédérales. L'activisme fédéral était maintenant jugé comme une « intrusion » injustifiée.

M. Schultz a identifié trois phases dans les relations fédérales-provinciales en matière de télécommunications : les escarmouches préliminaires, de 1970 à 1972; les négociations de 1973 à 1975; et les négociations depuis 1976[13]. C'est le *Livre vert* du fédéral en 1973 qui a tout d'abord suscité les préoccupations des provinces en matière de télécommunications[14]. Ces préoccupations ont été énoncées lors de la première conférence des ministres des Communications en novembre 1973 lors de laquelle les provinces ont tenté d'obtenir un transfert du pouvoir de décision du gouvernement fédéral. En 1975, les provinces ont présenté une « position de consensus » qui, entre autres, exigeait la mainmise des provinces sur tous les réseaux et tous les services de télédistribution ainsi que le pouvoir de réglementation des sociétés de télécommunication dont les installations étaient situées en majeure partie dans une même province[15]. Avant la tenue des conférences de 1975, le gouvernement fédéral a publié un *Livre gris* qui faisait état de ces propositions relativement aux mécanismes de consultation dans des domaines qui relevaient jusque-là exclusivement du fédéral[16]. Les deux parties ont jugé les propositions de l'autre inacceptables.

Comme le souligne M. Schultz, « pendant les quelques années qui suivirent 1975, les négociations fédérales-provinciales portèrent presque exclusivement sur deux questions, soit la délégation d'une certaine responsabilité aux provinces en matière de télédistribution et l'accroissement du contrôle politique de l'organisme de réglementation fédérale, le CRTC »[17]. En 1976, le gouvernement fédéral et le Manitoba ont effectivement conclu un accord qui cédait des pouvoirs substantiels à la province[18] — bien que les décisions subséquentes du CRTC soient venues limiter l'application de l'accord[19]. Trois décisions du CRTC vers la fin des années 1970 ont attisé le désir des provinces d'obtenir une plus grande mainmise sur les télécommunications. Il s'agissait de la décision d'octobre 1977 relative à *Challenge Communications* qui libéralisait le raccord de terminaux[20], la requête du CNCP pour l'interconnexion des réseaux en 1978, approuvée en mai 1979[21], et la décision du CRTC en octobre 1978 en vertu de laquelle il devait effectuer une enquête approfondie sur les tarifs et les pratiques du

RTT[22]. Remarquons que les provinces n'ont pas réussi à faire modifier par le cabinet la décision relative au CNCP.

C'est ainsi qu'au début des pourparlers constitutionnels à l'été de 1980, les deux niveaux de gouvernement pouvaient constater qu'il n'y avait « aucun accord substantiel relativement à la répartition des rôles et des responsabilités entre les divers niveaux de gouvernement ou aux mesures générales visant les télécommunications »[23]. Et ce malgré, aux dires de M. Schultz, « presque une décennie de négociations comprenant six conférences fédérales-provinciales et cinq conférences interprovinciales ainsi que des rencontres innombrables à l'échelon ministériel et administratif »[24]. Comme nous le verrons, les positions des deux parties étaient presque aussi éloignées suite à la rencontre décisive de septembre 1980[25].

L'ambiguïté constitutionnelle

C'est depuis 1906 que le fédéral réglemente certaines compagnies de téléphone, bien que Bell Téléphone ait été constituée en corporation par une loi spéciale du gouvernement en 1880[26]. De 1885 à 1889, Bell a créé des filiales à l'Île-du-Prince-Édouard, en Nouvelle-Écosse et au Nouveau-Brunswick bien que celles-ci devaient être par la suite réglementées par les régies de services publics provinciales. En 1907 et 1908, les trois provinces des Prairies ont créé des compagnies de téléphone d'État et racheté les avoirs de Bell sur leurs territoires. B.C. Tel est tombée sous le coup de la réglementation fédérale en 1916.

Comme le soulignent Robert Buchan et Christopher Johnston, « la cause principale ayant trait à la juridiction en matière d'installations et de services téléphoniques est celle qui a opposé la Toronto Corporation à la Bell Telephone Company of Canada[27], entendue par le Comité judiciaire du Conseil privé en 1905 ». MM. Buchan et Johnston ajoutent que « le Comité a jugé que les activités locales et interurbaines de Bell Canada ne constituaient pas des entreprises séparées et distinctes à des fins de réglementation (...) »[28]. Ce faisant, le Conseil privé « confirmait la compétence du fédéral dans tous les aspects des activités téléphoniques de Bell, que le Parlement a déclaré « contribuer à l'avantage général du Canada » conformément à l'article 92(10)(c) de l'Acte de l'Amérique du Nord britannique »[29].

Ce qui ressort surtout de cette décision, c'est que ni le fédéral ni quelque province que ce soit a cherché à « précipiter un règlement judiciaire des questions juridiques constitutionnelles relativement à la compétence relative aux activités d'interconnexion, en télécommunications, qui assurent des services de télécommunication intra et interprovinciaux à l'aide d'installations communes d'interconnexion »[30]. Cette description vaut pour chacun des dix membres du RTT. Remarquez que trois sont réglementés par le fédéral (Bell, B.C. Tel et Télésat Canada), six sont réglementés par des régies de services

publics provinciales et un est réglementé par le cabinet d'une province. Des sept compagnies réglementées par les provinces, quatre appartiennent à des investisseurs.

Le fait que les deux niveaux (ordres) de gouvernement n'aient pas cherché à déterminer leur situation aux termes de la constitution est remarquable pour deux raisons. Tout d'abord, malgré les accusations des provinces au sujet de l'agressivité de l'« intrusion » du fédéral dans les questions de compétence provinciale, le gouvernement fédéral semblerait jouir de fortes prétentions à une compétence fédérale exclusive quant à tous les services interprovinciaux de téléphone et de télégraphe, et quant à toutes les installations et à tous les réseaux raccordés entre eux qui assurent de tels services. En second lieu, on a cherché une clarification judiciaire dans bien d'autres domaines : la radiodiffusion, les transports, les relations de travail, les pêches, l'énergie et les ressources naturelles[31].

Pourquoi les deux parties ont-elles renoncé aux joutes constitutionnelles? MM. Buchan et Johnston offrent l'explication suivante : « Les deux parties ont de sérieuses réserves justifiées quant au caractère désirable du cadre de compétence et de réglementation que pourraient imposer les tribunaux »[32]. À leur avis, on en ressortirait avec soit une compétence exclusive du fédéral, soit un régime à deux niveaux de compétences partagées comme on en connaît dans les pêches, le transport routier et les formes d'énergie non nucléaire.

Ce qui est encore plus remarquable, c'est que les compagnies de téléphone privées n'aient pas cherché à brouiller les cartes constitutionnelles. Mais cela s'explique peut-être si l'on considère que, jusqu'à il y a environ dix ans, tant le fédéral que le provincial ont exercé leur pouvoir de réglementation de façon plutôt discrète[33]. En outre, plus de la moitié des revenus (c'est-à-dire interurbains, intra et interprovinciaux) des compagnies membres du RTT avaient effectivement échappé à la réglementation jusqu'en 1978 lorsque le CRTC a annoncé qu'il examinerait les tarifs du RTT[34]. Les compagnies de téléphone jouissaient donc d'une très importante soupape de sûreté pour toute pression qu'exerçaient sur eux les organismes de réglementation fédéraux ou provinciaux.

On risque davantage de voir une importante contestation devant les tribunaux au cours des années 1980 en raison de trois facteurs : la sévérité croissante des règlements sur la rentabilité, compte tenu de l'augmentation de l'inflation, l'examen par les organismes de réglementation des tarifs interurbains du RTT et de ses mécanismes de règlement, et la libéralisation des règlements sur le raccord des terminaux et l'interconnexion des réseaux, qui ont accru les pressions de la concurrence.

Les changements technologiques et économiques

Depuis au moins dix ans, l'industrie des télécommunications est en pleine révolution technologique. Manley Irwin et Hudson Janisch affirment que nous nous acheminons vers une « économie de l'information » dont ils décrivent la technologie en ces termes :[35]

— La technologie de l'information est multidisciplinaire, multi-industrie, multigouvernementale et multinationale;
— Les produits du domaine de l'information se caractérisent par la miniaturisation, une vitesse incroyable et une réduction dramatique des coûts;
— Les produits intelligents qui emmagasinent, traitent et transmettent l'information deviennent de plus en plus disponibles à mesure que les coûts chutent et que des nouveaux producteurs entrent sur le marché;
— Des nouveaux vendeurs et des nouveaux produits occasionnent une explosion des systèmes de distribution de l'information au sein des entreprises et entre elles, aux niveaux local et international;
— Les nouveaux arrivants, réels ou éventuels, sur le marché des communications provoqueront une restructuration fondamentale de l'industrie;
— Les bouleversements technologiques sont en voie de brouiller et d'effacer les frontières entre les divers produits, les diverses industries et les divers services;
— Le rythme du changement technologique, bien qu'inégal, est très rapide comparé à la plupart des secteurs de l'économie.

À ce jour, les organismes de réglementation des télécommunications au Canada ainsi que les décideurs n'ont pas vu d'un bon oeil ce « cauchemar de possibilités technologiques »[36]. Par ailleurs, on peut relever un certain nombre de décisions qui ont eu pour effet de relâcher les liens de la réglementation sur des monopoles de longue date. Le CRTC[37] et certains des organismes de réglementation provinciaux[38] ont permis le raccord de terminaux sous la forme d'un matériel de radio-téléphone automatique et de postes téléphoniques appartenant aux abonnés ainsi que de matériel PBX connexe. Le CNCP, qui offre la transmission interurbaine de données, a obtenu la permission du CRTC de se brancher au réseau de Bell Canada[39]. Certaines provinces ont aussi permis une telle interconnexion des réseaux[40].

Par contre, il est possible de relever des décisions moins intéressantes en matière de réglementation ou de politique : l'acquisition et l'intégration verticale de AEL Microtel par B.C. Tel[41]; la permission accordée à Télésat Canada par le cabinet de faire partie du RTT, garantissant par là un monopole total sur la transmission interurbaine téléphonique aux compagnies membres du RTT[42]; le projet de réglementation des tarifs des compagnies de téléphone visant les

services dits concurrentiels[43]; et la décision de permettre au plus important télédistributeur d'acheter la deuxième plus importante entreprise de télédistribution au Canada, accordant ainsi à l'entreprise fusionnée près de 28 % de tous les abonnés dans le pays le plus câblé au monde[44].

Le principal effet de la révolution technologique est de rendre la concurrence à la fois possible et souhaitable. Le monopole naturel de l'interurbain est disparu[45]. Il se pourrait même que le service local ait connu le même sort[46]. Avec la fin des conditions de monopole naturel, un des principaux fondements de la réglementation s'est effondré. Il reste cependant que les autres raisons d'être de la réglementation ont été inventées pour étayer celles du monopole naturel. On en remarque deux en particulier : « l'imposition par la réglementation » ou la réglementation destinée à permettre une redistribution des revenus entre les classes d'acheteurs de services réglementés; et la réglementation destinée à assurer la souveraineté, l'identité culturelle et l'unité nationale.

Le fort penchant des Canadiens envers l'intervention de l'État vient s'ajouter à ces barrières à une plus grande concurrence[47], sans compter leur manque d'enthousiasme envers la concurrence comme force vitale de la vie économique (et sociale).

C'est cependant la prolifération des subventions compensatoires qui constitue la plus importante barrière à une diminution de la réglementation et à une augmentation de la concurrence. Par exemple, Bell Canada estime qu'en 1981 les coûts du service local ont dépassé les revenus du tarif mensuel fixe de 710 $ millions[48]. Ce sont donc les revenus de l'interurbain, qui ont dépassé de 725 $ millions les prévisions de dépenses, qui sont venus compenser ce déficit. Bell calcule que chaque dollar de revenu de l'interurbain n'exige que 0,43 $ de dépense. Par contre, le service local exige des dépenses de 1,84 $ pour chaque dollar de revenu[49].

M. Schultz démontre que les revenus de l'interurbain intra et interprovincial importent particulièrement aux compagnies téléphoniques gouvernementales des Prairies : ces revenus représentent de 60 à 67 % du revenu d'exploitation[50]. Il n'est donc pas surprenant que ce soit ces compagnies/provinces qui se montrent le plus inflexibles face au maintien des bas tarifs locaux. Ceci se fait maintenant grâce aux tarifs interurbains élevés. Si l'on ouvrait le marché de l'interurbain (cela s'est déjà produit aux États-Unis)[51], les tarifs interurbains *pourraient* chuter de 50 %, tandis que les tarifs mensuels pour le service local subiraient une augmentation d'au moins 33 %[52]. L'analyse de Melvyn Fuss et de Leonard Waverman portant sur Bell Canada indique qu'une détermination des prix en fonction des coûts *marginaux* provoquerait une augmentation de 70 % du prix du service local et une baisse de 70 % et 50 % respectivement

des tarifs interurbains monopolisés et des tarifs interurbains concurrentiels (par exemple, ceux qui se rapportent aux données)[53].

Barry Lesser soutient que, si l'on cherche à encourager la concurrence, il peut être justifié d'accorder des plus grands pouvoirs de réglementation et d'orientation au gouvernement fédéral[54]. Pourtant c'est ce même gouvernement fédéral qui a cherché à limiter la réception des signaux de radiodiffusion provenant directement des satellites au nom du contenu canadien, de la culture et de l'unité[55]. Avec l'avènement des antennes paraboliques petites et peu onéreuses, toute tentative de contrôler une telle réception est vouée à l'échec. Dans une grande mesure, la technologie semble fixer ses propres règles.

Plus globalement, on se demande sérieusement si la réglementation de type classique, par les régies de services publics, peu importe de quel ordre de gouvernement elles relèvent, peut survivre aux vagues de changement technologique[56]. D'ici dix ans, il se pourrait bien que l'actuelle querelle constitutionnelle au sujet des télécommunications nous semble aussi futile que les efforts du roi Canute pour maîtriser les marées. Cela ne signifie pas que le gouvernement fédéral ne fera pas appel à toute une gamme d'instruments du pouvoir autres que la réglementation classique des services publics pour chercher à atteindre ses objectifs de souveraineté, d'identité et d'unité[57]. On peut également s'attendre que les provinces continuent à chercher à consolider leurs positions et donc à tenter d'exercer une maîtrise importante des télécommunications. Il est donc peu probable que nous connaissions un marché commun libre de barrières dans le domaine des services de télécommunication.

Une évaluation des projets fédéral et provincial

Le professeur Lesser utilise le modèle Breton-Scott pour évaluer certaines des conséquences économiques de l'exercice de la réglementation des télécommunications soit par le fédéral, soit par le provincial. On identifie quatre types de frais organisationnels : les frais administratifs (les dépenses budgétaires des gouvernements relatives aux activités de réglementation); les frais de coordination (les frais des activités intergouvernementales); les frais de signalisation (les frais provenant du fait que les citoyens font valoir leur préférence au gouvernement); et les frais de mobilité (les frais imposés aux citoyens par le transfert de compétences)[58].

L'optimisation de ces frais organisationnels ne constitue qu'un des éléments dont tient compte chacune des parties. Les préférences non économiques des politiciens et des bureaucrates en matière de répartition constitutionnelle importent beaucoup. Les télécommunications ne constituent qu'un des atouts dans le grand jeu des négociations constitutionnelles. (Et ce jeu ne s'est pas terminé avec l'arrivée

de la nouvelle constitution au Canada en avril 1982.) En outre, une nouvelle répartition des pouvoirs entre les deux niveaux/ordres de gouvernement entraîne des coûts, peut-être importants.

M. Lesser conclut que les frais organisationnels d'une compétence exclusive du fédéral seraient moindres que ceux entraînés par une compétence exclusive du provincial en matière de télécommunications. Il estime aussi que « une compétence exclusive du fédéral assurerait une plus grande qualité » qu'une compétence exclusive du provincial ou qu'une compétence partagée. Quant aux frais organisationnels, une compétence partagée « entraînerait probablement des frais moins élevés qu'une compétence provinciale exclusive »[59].

Le fait qu'un politicologue, deux avocats et un économiste s'entendent pour trouver tout à fait insatisfaisants les projets fédéral et provincial de septembre 1980 mérite d'être noté. L'économiste, M. Lesser, remarque que « fondamentalement, le projet des provinces ne tient pas suffisamment compte des coûts, tandis que celui du fédéral ne fait pas assez de place aux préférences des politiciens provinciaux »[60]. M. Lesser prétend plus précisément que la garantie des provinces relativement à la libre circulation de l'information est « trop faible pour garantir réellement contre de tels bouleversements ». Par ailleurs, le projet de commission de réglementation conjointe du fédéral « constitue un moyen insuffisant d'assurer aux provinces un véhicule efficace pour exprimer leurs préoccupations face aux services interprovinciaux et aux questions connexes »[61]. En vertu du projet fédéral, la majorité des membres de la commission conjointe seraient nommés par le fédéral.

MM. Buchan et Johnston établissent quatre critères permettant d'évaluer les deux projets :[62]

— Y pondère-t-on les intérêts des deux niveaux de gouvernement dans un régime fédéral?
— Les pouvoirs accordés suffisent-ils pour permettre à chaque niveau de gouvernement de réglementer pleinement son propre domaine?
— Les sphères respectives d'autorité sont-elles délimitées assez clairement pour éviter des chevauchements ou le conflit?
— Les projets risquent-ils de donner une réglementation cohérente, juste et efficace profitant à tous les groupes d'intérêts?

Ils concluent que, face à de tels critères, aucun projet n'est satisfaisant, bien que celui du fédéral y réponde davantage.

MM. Buchan et Johnston laissent entendre que leur évaluation des deux projets de septembre 1980 a rehaussé à leurs yeux la cote de l'actuelle structure de réglementation, malgré ses tares. À leur avis elle a donné « un régime de télécommunications complet, varié et efficace qui est sensible aux besoins tant locaux que nationaux »[63].

M. Schultz part du principe que « les deux niveaux de gouvernement ont des intérêts légitimes qui doivent être respectés si on espère en venir à une répartition mutuellement satisfaisante des responsabilités »[64]. Il conclut que le gouvernement fédéral est en droit de vouloir maintenir un réseau de télécommunications intégré à l'échelle nationale et résoudre les conflits inévitables qu'entraîne le maintien d'un tel réseau. Il admet aussi la valeur des préoccupations provinciales face à la structure des prix actuels et projetés dans le domaine des services de télécommunication. Il faut dire que M. Schultz est plus porté vers la position provinciale que M. Lesser ou MM. Buchan et Johnston. À son avis, « on devrait répartir les responsabilités en matière de réglementation de manière que chacune des provinces puisse chercher à atteindre ses objectifs en matière de télécommunications avec le degré maximum de liberté tout en garantissant la protection des objectifs nationaux et des moyens pour les atteindre »[65].

M. Schultz remarque que ce ne sont pas seulement les provinces qui rejettent la répartition des pouvoirs du fédéral, mais aussi l'ensemble des sociétés exploitantes en raison de l'inefficacité d'une réglementation à deux niveaux. On brandit le spectre de l'expérience américaine. Bref, M. Schultz conclut que le projet fédéral de septembre 1980 « offre peu qui mérite d'être étudié sérieusement ». Il conclut par ailleurs « que le projet provincial est aussi défectueux que celui du fédéral »[66]. Les provinces refusent, par exemple, « de reconnaître que le gouvernement fédéral a des intérêts légitimes dans le développement et le rendement d'un réseau de télécommunications ». En outre, leur projet « évite de prévoir, à une exceptionprès, un mode de décision de rechange à l'échelle nationale »[67]. Et cette exception, qui a trait à la libre circulation de l'information, est elle-même « très contestable ».

En conclusion, chacun des trois textes traduit une insatisfaction face au projet des deux ordres de gouvernement. Il s'agit donc maintenant de voir si leurs auteurs peuvent faire mieux.

Vers une nouvelle solution

On a jugé que les projets fédéral et provincial de septembre 1980 relativement à la répartition des pouvoirs de réglementation en matière de télécommunications renfermaient de nombreuses lacunes à plusieurs titres. Ce qui est encore plus important, cependant, c'est qu'aucune des deux parties ne peut accepter les propositions de l'autre. Mais puisque le problème est effectivement complexe, il est évident que chacun des analystes de ce livre se prend maintenant à admirer davantage le régime actuel, malgré sa lourdeur. Ils font cependant des propositions aptes à l'améliorer.

Nous avons résumé les traits essentiels de chacune des propositions des auteurs au tableau 1. Il importe de souligner quelques points relatifs à chacune de ces propositions. En premier lieu, les quatre

projets proposent des changements qui n'exigeront pas d'amendement constitutionnel. Le projet de Gregory Kane[68] (et peut-être celui de M. Lesser) n'exigerait même pas de nouvelle loi. En deuxième lieu, M. Schultz ainsi que MM. Buchan et Johnston proposent une nouvelle commission de réglementation conjointe qui régirait les tarifs interprovinciaux et internationaux, les services, l'interconnexion, le raccordement, etc. M. Kane propose une table ronde conjointe qui siégerait au besoin et qui comprendrait des membres d'organismes de réglementation déjà en existence. Cette table ronde ne pourrait que faire des recommandations et non prendre des décisions qui obligeraient les acteurs en jeu. M. Lesser propose une commission d'orientation conjointe, analogue à celle de M. Kane mais chargée de faire incorporer à la loi ses recommandations, dépendant de la taille et de la composition de la majorité formulant les recommandations.

En troisième lieu, en vertu des propositions de M. Schultz et de MM. Buchan et Johnston, le gouvernement fédéral n'aurait plus son propre tribunal de réglementation. Au lieu, les sociétés exploitantes soumises actuellement à la réglementation exclusive du fédéral relèveraient de la nouvelle commission conjointe dont une majorité des membres proviendraient des organismes de réglementation provinciaux. En quatrième lieu, dans les quatre projets, les provinces conserveraient la compétence exclusive quant aux questions intraprovinciales, bien que M. Lesser propose que le gouvernement fédéral puisse adopter des lois prépondérantes visant les télécommunications interprovinciales lorsque les deux tiers des provinces ont accepté les recommandations de la commission d'orientation conjointe.

En cinquième lieu, M. Schultz et MM. Buchan et Johnston sont d'un avis fort différent quant à la question des appels. M. Schultz prévoit que le cabinet fédéral pourrait se charger à la fois d'émettre des lignes directrices et d'entendre les appels suite, dans les deux cas, à une consultation obligatoire avec les provinces. MM. Buchan et Johnston ne permettraient pas des appels au cabinet, mais lui permettrait d'émettre des lignes directrices seulement après avoir entendu le public et consulté les provinces. En sixième lieu, le projet de M. Kane, à la différence des trois autres, ne prévoit aucun mécanisme pour le règlement définitif des conflits entre les organismes de réglementation fédéraux et provinciaux. Il dépend pour une bonne part de la bonne volonté et de la coopération. Par exemple, si la table ronde conjointe recommandait l'interconnexion des systèmes de manière fort permissive, mais qu'une ou deux provinces s'y opposaient, cela pourrait paralyser l'efficacité des services de télécommunication canadiens. Même si M. Lesser prévoit des lois fédérales pour donner suite aux recommandations de sa commission d'orientation conjointe, de telles lois ne seraient prépondérantes que si elles visaient des tarifs

Tableau 1
RÉSUMÉ DES PROJETS DE RÉFORME DE LA RÉGLEMENTATION COMPÉTENCE EN MATIÈRE DE TÉLÉCOMMUNICATIONS

Caractéristiques du projet	Schultz	Buchan et Johnston	Lesser	Kane
Type	Commission conjointe de réglementation (sans amendement constitutionnel)	Commission conjointe de réglementation (sans amendement constitutionnel)	Commission conjointe d'orientation (sans amendement constitutionnel)	Table ronde conjointe (sans amendement constitutionnel)
Pouvoir législatif	• Fédéral • Renfermerait un énoncé des principes nationaux en matière de télécommunications	• Fedéral • Renfermerait un ensemble d'objectifs d'orientation des télécommunications nationales, sur lequel s'entendraient préférablement les deux niveaux de gouvernement	• Aucune mention, probablement pas nécessaire	• Pas nécessaire • Recours à un accord officiel fédéral-provincial visant les organismes de réglementation pertinents
Les responsabilités	• Réglementerait les tarifs et les services interprovinciaux et internationaux, y compris l'interconnexion des réseaux • Réglementerait les actuelles sociétés exploitantes fédérales, c'est-à-dire le CNCP, Télésat, Téléglobe • Réglementerait l'interconnexion du matériel à prise directe du réseau • Réglementerait les aspects interprovinciaux de la télévision par câble • Les provinces seraient chargées de réglementer les tarifs et les services intraprovinciaux (cela exigerait un transfert de compétence à l'égard de certaines sociétés exploitantes, par exemple Bell Canada, B.C. Tel.)	• Approuverait les tarifs des services reliant deux provinces ou plus • Approuverait les accords de raccordement entre deux réseaux reliant deux provinces ou plus • Réglementerait les nouvelles compagnies offrant des services dans plus qu'une seule province • Réglementerait l'interconnexion du matériel à prise directe du réseau • Instituerait un régime uniforme de determination des prix et de comptabilité • Le CNCP, Télésat et Téléglobe relèveraient de la commission conjointe • Les provinces réglementeraient les tarifs et les services intraprovinciaux	• Ferait des recommandations quant aux politiques régissant les télécommunications intraprovinciales, interprovinciales et internationales, y compris la création de messages - et la redistribution des signaux d'émission • Les recommandations seraient faites sous réserve d'une ratification par l'ensemble des onze gouvernements, mais, dans le cas des services interprovinciaux ou internationaux, les provinces ne pourraient qu'accepter ou rejeter les recommandations et non les modifier • Le gouvernement fédéral aurait l'autorité d'adopter des lois prépondérantes quant aux services intraprovinciaux lorsque les mesures auraient été recommandées par la commission d'orientation conjointe et qu'au moins les deux tiers des provinces auraient accepté la recommandation	• Le seul pouvoir de faire des recommandations pour les organismes de réglementation fédéraux et provinciaux actuels. Ils doivent prendre la décision et y donner suite • Traiterait des questions convenues mutuellement qui en elles-mêmes ou en vertu de leurs effets affecteraient deux champs de compétence ou davantage dans lesquels un pouvoir de réglementation s'exerce sur les télécommunications. Cela comprendrait l'interconnexion des réseaux, le raccord de terminaux, les règlements de revenus connexes, les principes de réglementation, les méthodes de détermination des prix et les questions où il y a contestation de compétence

			• Le gouvernement fédéral aurait le pouvoir d'adopter des lois prépondérantes dans le cas de services interprovinciaux ou internationaux *et* lorsque la loi donnerait suite à des mesures recommandées par la commission conjointe • Le gouvernement fédéral aurait la compétence exclusive quant aux questions techniques relatives à la gestion du spectre radio, des dimensions spatiales des satellites de communication et des communications pour l'aéronautique, la défense, etc.	
Les appels et les lignes directrices	• Les lignes directrices pourraient venir du fédéral après consultation obligatoire avec les provinces • Les appels au cabinet fédéral après la consultation obligatoire avec les provinces	• Mécanisme de révision interne par l'ensemble de la commission comme dans le cas du CRTC et de la CTC actuellement; critère semblable pour la révision • Droits normaux de révision judiciaire en vertu de la Loi sur les tribunaux fédéraux • Aucun appel au cabinet • Ligne directrice après consultation avec les provinces et le public	• Voir les responsabilités	• Appels suite aux décisions des organismes de réglementation participants
La composition	• La majorité des représentants des provinces seraient des présidents des organismes de réglementation provinciaux ou des personnes désignées par ces organismes • Fonctionnerait en groupes de trois; deux membres provinciaux, un membre fédéral si deux provinces sont intéressées; augmenter la taille du groupe si plus de provinces sont intéressées	• Neuf membres dont six seraient des présidents ou vice-présidents des organismes provinciaux et qui siégeraient aux deux organismes. Ils seraient des membres à temps partiel • Les trois représentants fédéraux seraient à temps plein et un d'entre eux serait président	• Treize membres; un de chaque province et trois représentants fédéraux • Le vote à majorité simple	• Le nombre de représentants à une table ronde dépendrait du nombre d'organismes de réglementation touchés; certains organismes pourraient s'entendre pour déléguer le même représentant • Un des organismes de réglementation serait considéré comme l'organisme « hôte » pour chaque audience

ou des services interprovinciaux ou internationaux, ou, dans le cas des questions interprovinciales, si les deux tiers des représentants des provinces siégeant à la commission recommandaient cette politique. Puisque la commission serait formée de dix représentants des provinces et de trois représentants du fédéral, la majorité, même simple, exige que quatre provinces s'allient aux trois représentants fédéraux pour décider de questions qui paraissent actuellement relever exclusivement de la compétence du fédéral.

En résumé, l'adoption de n'importe lequel de ces quatre projets rapprocherait les provinces de la position qu'elles ont définie en septembre 1980. Dans chaque cas, le gouvernement fédéral accepterait de partager ses pouvoirs sur des questions qu'il jugeait jusqu'ici relever exclusivement de lui. Il semble que les « triomphes » du fédéralisme canadien comportent presque toujours une perte réelle de pouvoir législatif pour le gouvernement fédéral. La satisfaction des aspirations des provinces, même celles que M. Schultz décrit comme « les aspirations légitimes des provinces », se fait aux dépens du pouvoir fédéral. On ne voit pas très bien pourquoi le gouvernement fédéral voudrait adopter une telle solution.

Notes

[1] Statistique Canada, *Statistique du téléphone 1980*, n° cat. 56-203 et *Statistique des télécommunications 1980*, n° cat. 56-201, Ottawa, ministère de l'Industrie et du Commerce, 1981. En 1980, les revenus d'exploitation de l'industrie téléphonique s'élevaient à 5,85 $ milliards. Ce chiffre ne comprend cependant pas les revenus des Télécommunications CNCP, de Télésat Canada et de Téléglobe.

[2] Statistique Canada, *Télédistribution 1980*, n° cat. 56-205, Ottawa, ministère de l'Industrie et du Commerce, 1981.

[3] Voir, par exemple, « 6 Companies Given Licences for Pay-Television Networks », *Globe and Mail* (Toronto) (19 mars 1982), p. 1 et 2. On s'attend que ce service entre en exploitation en avril 1983.

[4] Statistique Canada, *Radiodiffusion et télévision 1980*, n° cat. 56-204, Ottawa, ministère de l'Industrie et du Commerce, 1981. En 1980, le total des revenus des radiodiffuseurs (radio et télévision) publics et privés s'élevait à 1 063,4 $ millions. Toutefois, Radio-Canada, qui figure dans ce total, avait des dépenses dépassant de 500 $ millions ses revenus de 104 $ millions.

[5] Voir, par exemple, S. Serafini et M. Andrieu, *La révolution de l'information et sa signification pour le Canada*, Ottawa, ministre des Approvisionnements et Services Canada, 1981. Un récent article de journal affirme que l'on prévoit que le marché de l'interconnexion atteindra les deux milliards de dollars d'ici 1986, contrairement aux revenus de 500 $ millions en 1982. Voir J. Chevreau, « CP Ltd. and CN After Market in Interconnects », *Globe and Mail* (Toronto) (27 février 1982), p. B2, et « Baby Bell Is Healthy, Growing », *Globe and Mail* (Toronto) (12 avril 1982), p. B3.

[6] R. Schultz, « Partners in a Game Without Masters: Reconstructing the Telecommunications Regulatory System », dans *Telecommunications Regulation and the Constitution*, Montréal, l'Institut de recherches politiques, 1982, p. 50.

[7] A.C. Cairns, « The Governments and Societies of Canadian Federalism », *Revue canadienne de science politique*, 10 (1977), p. 708.

[8] Voir, par exemple, le Conseil économique du Canada, *Pour une réforme de la réglementation*, Ottawa, ministre des Approvisionnements et Services Canada, 1981, chap. 5.

[9] Voir la discussion dans Schultz *supra*, note 6, et dans R.J. Buchan et C.C. Johnston, « Telecommunications Regulation and the Constitution: A Lawyer's Perspective », dans *Telecommunications Regulation and the Constitution*, Montréal, l'Institut de recherches politiques, 1982.

[10] Schultz *supra*, note 6, p. 50.

[11] Voir l'avis public Télécom 1978-18 du CRTC et la Décision Télécom 81-13 du CRTC (7 juillet 1981). Cette décision portait sur les tarifs et les règlements relatifs à l'accès à la transmission par satellite. Remarquez que l'on en a appelé de cette décision au cabinet qui en a modifié quatre points. Aux termes de la Décision Télécom 81-13, le CRTC avait décidé que les radiodiffuseurs ainsi que les télédistributeurs pourraient dorénavant traiter directement avec Télésat Canada dans le but de louer des répondeurs de satellite pour utilisation permanente ou occasionnelle. Le cabinet a toutefois décidé (CP 1981-3456, le 8 décembre 1981) que ceux (surtout des entreprises commerciales) qui n'utilisent qu'une partie d'un canal de satellite devront passer par des sociétés exploitantes approuvées, soit les membres du RTT, le CNCP et quinze autres sociétés exploitantes approuvées. Cela accroîtra la concurrence entre le CNCP et le RTT.

Par ailleurs, le cabinet a maintenu la décision du CRTC obligeant à une redistribution des revenus de l'interurbain entre les membres du RTT. Voir J. Chevreau, « Telesat Expects Little Change in Service for Broadcasters », *Globe and Mail* (Toronto) (21 décembre 1981), p. B1.

[12] Voir, par exemple, R. Bird, *Financing Canadian Government: A Quantitative Overview*, Toronto, Canadian Tax Foundation, 1979, chap. 5.

[13] Schultz *supra*, note 6, p. 57.

[14] Ministre des Communications, *Vers une politique nationale de la télécommunication* (Livre vert), Ottawa, Information Canada, 1973.

[15] Voir Schultz *supra*, note 6, p. 59.

[16] Ministre des Communications, *Télécommunications : quelques propositions fédérales* (Livre gris), Ottawa, Information Canada, 1975.

[17] Schultz *supra*, note 6, p. 60.

[18] On peut trouver les détails dans la déclaration publique du 10 novembre 1975 du ministre fédéral des Communications.

[19] Voir H.N. Janisch, « Policy Making in Regulation Towards a New Definition of the Status of Independent Regulatory Agencies in Canada », *Osgoode Hall Law Journal*, 17 (1979).

[20] CRTC, Décision Télécom 77-11, le 7 octobre 1977. On trouvera une discussion utile de cette décision et d'autres se rapportant à la libéralisation de la réglementation en matière de télécommunications dans G.E. Kaiser, « Competition in Telecommunications: Refusals to Supply by Regulated Common Carriers », dans P. Grant (éd.), *New Developments in Canadian Communications Law and Policy*, Toronto, Law Society of Upper Canada, 1980.

[21] CRTC, Décision Télécom 79-11, le 17 mai 1979. Bell Canada, avec l'appui des provinces, en a appelé sans succès de cette décision au cabinet.

[22] Voir la note 11 *supra*.

[24] Schultz *supra*, note 6, p. 64.

[24] *Ibid.*, p. 64.

[25] On trouvera la position du fédéral à l'annexe B, tandis que la position de consensus des provinces se trouve à l'annexe D de ce volume.

[26] Les détails que l'on trouve dans ce paragraphe proviennent de Buchan et Johnston *supra*, note 9. On trouvera des détails supplémentaires sur les origines de la réglementation fédérale dans C. Baggaley, « Belling the Cat: The Art of the Possible and the Introduction of Federal Telephone Regulation in Canada, 1880–1910 », (document inédit préparé à l'intention de l'Institut de recherches politiques, août 1981, miméo.).

[27] [1905] A.C. 52 (P.C.).

[28] Buchan et Johnston *supra*, note 9, p. 119.

[29] *Ibid.*

[30] *Ibid.*

[31] Ces raisons sont données par Buchan et Johnston *supra*, note 9, p. 119.

[32] *Ibid.*, p. 119–20.

[33] Voir L. Waverman, « The Process of Telecommunications Regulation in Canada » mandat sur la réglementation publique, document de travail n° 28, Ottawa, Conseil économique du Canada, 1982. Il semble que Bell Canada n'ait pas présenté de cause relative aux tarifs de 1927 à 1949.

[34] Voir la Décision Télécom 81–13 du CRTC, le 7 juillet 1981. On a porté cette décision en appel au cabinet. Le 8 décembre 1981, en vertu de CP 1981–3456, le cabinet modifiait la décision en écartant la partie qui opposait un refus à l'article 2.6 du tarif proposé et ordonnait à Télésat de déposer à nouveau cet article du tarif sans limiter sa clientèle possible. On a cependant maintenu dans son ensemble la décision du CRTC relative aux tarifs et aux règlements de revenus du RTT. Voir 2 C.R.R. 3–57 et la discussion à la note 11 *supra*.

Un livre récent sur les méthodes de gestion des Japonais aide à comprendre davantage le recours à l'ambiguïté : « Il existe, dans les organisations, différentes conditions qui rendent désirable ou intentionnelle l'imprécision : l'imprécision dans *l'intention* même (attendre de décider de la voie à emprunter) (...); dans la *relation* (dans les rapports entre personnes, entre les faits et la conclusion, entre la cause et l'effet, etc.); et dans la *communication* (brouiller les messages entre deux personnes). » Les auteurs établissent la comparaison suivante entre les attitudes des Japonais et des Occidentaux face à l'ambiguïté : « Ils acceptent plus facilement que nous davantage d'ambiguïté, d'incertitude et d'imperfection dans les organisations : ils y voient une réalité immuable de la vie, ce que les philosophes appellent un « donné existentiel ». On veut dire par là que de telles conditions *existent* tout simplement et donc que, plus vite on acceptera leur existence, mieux ça ira. » Voir R.T. Pascale et A.G. Athos, *The Art of Japanese Management*, New York, Warner Books, 1982, p. 140–141.

[35] M.R. Irwin et H.N. Janisch, « Information Technology and Public Policy: Regulatory Implications for Canada », communication présentée lors d'un symposium sur la réforme de la réglementation organisé par le programme de droit et d'économie de la Faculté de droit de l'université de Toronto à Alton, Ont., du 28 au 30 octobre 1981, miméo. Pour un point de vue plus général, voir M.R. Irwin, « Technology and Telecommunications: A Policy Perspective for the 80s », mandat sur la réglementation publique, document de travail n° 22, Ottawa, Conseil économique du Canada, 1981.

[36] Cette phrase est citée par Schultz *supra*, note 6.

[37] Voir la Décision Télécom 77–11 du CRTC, le 7 octobre 1977 (*Challenge Communications*), confirmée par la Cour d'appel fédérale (1978) 86 D.L.R. (3d) 351; l'autorisation d'appel à la Cour suprême du Canada a été refusée. Voir aussi l'ordonnance T–658 du CTC, le 22 mai 1975 (*Harding Communications*) et les procès subséquents : (1975) Cour supérieure du Québec 1116; (1977) C.A. du Québec 56; (1979) 1 R.C.S. 395. Voir aussi la cause implicant les radiocommunicateurs, *Collins Inc. et al.* c. *Bell Canada*, Décision Télécom 79–12 du CRTC, le 7 juin 1979 et la Décision Télécom 79–14 du 26 juillet 1979. Voir aussi la décision provisoire du CRTC relative au raccord de terminaux portant sur Bell Canada, Décision Télécom 80–13, le 5 août 1980 (résumée dans 1 C.R.R. B–90). Cette décision a permis le raccordement de téléphones à ligne unique,

de systèmes à clefs et de PBX appartenant aux abonnés sous réserve de certaines conditions techniques et autres. Le CRTC a rendu une décision semblable (n° 81-19) relativement à BC Tel le 22 octobre 1981 suite à une requête d'une compagnie qui voulait vendre des postes téléphoniques aux abonnés. On a par la suite ajouté toutes les compagnies de téléphone réglementées par le fédéral à la cause de Bell. Pour un point de vue négatif sur les effets de la permission de raccorder, voir L. Verschelden, « The Attachment of Subscriber Provided Terminal Equipment », Fédération nationale des communications, août 1980, miméo.

[38] Voir la décision, éventuellement favorable, par la Cour suprême de l'Île-du-Prince-Édouard, le 17 juin 1981, résumée dans 2 C.R.R. 3-43. Il s'agit de la cause *Garden of the Gulf Court and Motel*. Récemment, soit le 16 février 1981, l'Alberta Government Telephones a présenté une requête au Public Utilities Board de l'Alberta pour obtenir une ordonnance approuvant le transfert du matériel terminal téléphonique de la catégorie réglementée des services de base intraprovinciaux à celle, non réglementée, des services autres que les services de base. Dans une décision fort surprenante, le PUB a refusé d'approuver la requête de A G Tel demandant qu'on oblige les abonnés, *tant* commerciaux que résidentiels, à acheter leur matériel terminal. Voir la décision n° E81235 du 22 décembre 1981; 2 C.R.R. 2-376.

[39] Voir la note 21 *supra*.

[40] Voir Alberta Public Utilities Board, *Telecommunications Inquiry Report n° E80111*, le 1er septembre 1980, et, pour une décision en Nouvelle-Écosse qui a autorisé l'interconnexion d'un réseau de téléappel au réseau de Maritime Tel & Tel, voir 2 C.R.R. 1-150. Saskatchewan Tel a réussi à faire adopter une loi (Bill C-13) en 1980 qui interdit le raccordement de matériel fourni par l'abonné et l'interconnexion de réseaux sans la permission du service d'État. Voir *The Public Sector* (7 juillet 1980), p. 3. Le ministre des Téléphones de la Saskatchewan a souligné que l'interconnexion de réseaux du genre que voulait obtenir le CNCP occasionnerait un « écrémage » des segments les plus rentables du marché, laissant ainsi les régions rurales à Saskatchewan Tel.

[41] CRTC, Décision Télécom 79-17, le 18 septembre 1979.

[42] Voir la Décision Telecom 77-10 du CRTC, le 24 août 1977; (1977) 3 CRTC 265 telle qu'elle a été modifiée par le Décret du Conseil CP 1977-3152, le 1er novembre 1977.

[43] Voir la décision relative à la Phase II de l'enquête du CRTC sur les coûts, Décision Télécom 79-16, le 28 août 1979.

[44] Canadian Cablesystems Ltd. de Toronto a mis la main sur Premier Communications Ltd. de Vancouver pour 86,5 $ millions. La nouvelle entreprise sera propriétaire de 17 réseaux de télédistribution, y compris 72 % des abonnés à Vancouver et 51 % à Toronto. Voir B. Kirby, « CRTC Approves Takeovers of Two Cable TV Companies », *Globe and Mail* (Toronto) (31 juillet 1980) p. B2. Pour un point de vue plus général, voir D. MacFarlane « The King of Cable », *Saturday Night* (février 1981), p. 39-45.

[45] Voir M. Fuss et L. Waverman, *The Regulation of Telecommunications in Canada*, Mandat sur la réglementation publique, rapport technique n° 7, Ottawa, Conseil économique du Canada, 1981.

[46] Voir, par exemple, M.R. Irwin, « Local Networks in the United States: Technology vs. Regulation » (communication présentée au Congrès international de l'IDATE, Montpellier, France, le 26 octobre 1981); J.R. Meyer *et al.*, *The Economics of Competition in the Telecommunications Industry*, Cambridge, Mass., Oelgeschlager, Gunn and Haen, 1980; et « Dialling Locally — Without AT & T », *Business Week* (5 octobre 1981), p. 102, 106.

[47] Voir J.L. Howard et W.T. Stanbury, « Measuring Leviathan: The Size, Scope and Growth of Governments in Canada » (communication présentée lors de la conférence sur les gouvernements et l'économie du marché à l'université de Lethbridge, les 1er et 2 avril 1982).

[48] Bell Canada, « Report on the 5-Way Split Study of 1980 », le 25 mai 1981, miméo., p. 2. En 1981, ces deux montants ont dépassé un milliard de dollars. Voir le *Globe and Mail* (Toronto) (22 mai 1982), p. B1.

[49] *Ibid.*

[50] Schultz *supra*, note 6, p. 71.

[51] Le chef de file est MCI Communications Corp.

[52] L'élasticité-prix de la demande de l'interurbain est beaucoup plus prononcée que celle du service local.

[53] Fuss et Waverman *supra*, note 45.

[54] B. Lesser, « The Implications of the Federal and Provincial Proposals for Regulating Telecommunications: An Economist's Perspective », dans *Telecommunications Regulation and the Constitution*, Montréal, l'Institut de recherches politiques, 1982, p. 205.

[55] Voir, par exemple, T. Barrett, « Technology Outpacing Politicians Framing Communications Laws », *Vancouver Sun* (3 novembre 1980); les éditoriaux du *Globe and Mail* (Toronto) des 8 et 9 juillet 1980, « Pie From the Sky » et « Poor Stuff, but Our Own »; J. Lyon, « Meisel Message: Stop Poaching TV », *Financial Post* (7 juin 1980), p. 5; T. Barratt, « Licence Means McGeer's not a Pirate », *Vancouver Sun* (4 juin 1980), p. A13 (et 3 juin 1980, p. A17); « He's Got the Whole World in His Dish », *Globe and Mail* (Toronto) (10 juin 1980), p. 6; « B.C. Satellite 'Theft' Old Hat in the Wild », *The Gazette* (Montréal) (4 juin 1980), p. 41; G. Oake, « TV 'Dishes' Could Cook Up Revolt in North », *The Gazette* (Montréal) (4 juin 1980), p. 41.

[56] L'exemple le plus évident est le projet de Consent Order aux États-Unis en vertu duquel AT & T se départira de ses 22 compagnies d'exploitation locales. Voir *U.S.A.* vs. *Western Electric Company Inc. and American Telephone and Telegraph Company*, Civil Action 17-49, « Modification of Final Judgment » (Draft January 1982), U.S. District Court (New Jersey). Pour un point de vue plus général, voir « Stalking New Markets: A Slimmer AT & T Will Compete Fiercely in the World of High Technology », *Time* (25 janvier 1982), p. 52-55.

[57] Voir, par exemple, Comité consultatif des télécommunications et de la souveraineté canadienne, *Canada et la télécommunication*, Ottawa, ministre des Approvisionnements et Services Canada, 1979.

[58] Lesser *supra*, note 54, p. 177-178. Le modèle Breton-Scott se trouve dans A. Breton et A.D. Scott, *The Economic Constitution of Federal States*, Toronto, University of Toronto Press, 1978; et A. Breton et A.D. Scott, *The Design of Federations*, Montréal, l'Institut de recherches politiques, 1980. Les coûts de signalisation sont analogues à l'option « voix » et les coûts de mobilité à l'option « sortie » dans A.O. Hirschman, *Exit, Voice and Loyalty*, Cambridge, Mass., Harvard University Press, 1970.

[59] Lesser *supra*, note 54, p. 188.

[60] *Ibid.*, p. 202.

[61] *Ibid.*, p. 201.

[62] Buchan et Johnston *supra*, note 9, p. 138-139.

[63] *Ibid.*, p. 152.

[64] Schultz *supra*, note 6, p. 90.

[65] *Ibid.*, p. 92.

[66] *Ibid.*, p. 95.

[67] *Ibid.*, p. 95.

[68] T.G. Kane, « Breaking an Impasse: A Joint Panel Proposal for Telecommunications Regulation », dans *Telecommunications Regulation and the Constitution*, Montréal, l'Institut de recherches politiques, 1982.

Part II

Partners in a Game Without Masters: Reconstructing the Telecommunications Regulatory System

Richard Schultz*

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Governments have always tended to turn communications into a field of combat over sovereign prerogatives. From now on, this stretch of the ground may surreptitiously be stretched from their control if they do not provide themselves with the means to become a partner in a game where they can no longer be the master.[1]

Introduction

It is difficult to escape the conclusion that the present Canadian telecommunications regulatory system was designed by Rube Goldberg. The complex nature of jurisdictions, combined with an equally diverse variety of ownership structures, is such that it is sublime understatement to comment that jurisdiction over the telecommunications system is divided between the federal and provincial governments. At the federal level, the system consists of an agency that regulates two investor-owned companies operating in three provinces, one company operating across Canada that is a joint venture owned by a federal Crown corporation and a private enterprise, and finally a domestic satellite corporation jointly owned by the federal government and the nine telecommunications carriers who are members of the TransCanada Telephone System (TCTS). In addition, the Crown corporation providing international telecommunications services, except for those with the United States, is "regulated" directly by the minister of communications. At the provincial level, the system consists of six agencies plus one provincial Cabinet regulating four investor-owned companies and three provincial Crown corporations. TCTS, whose membership consists of the nine major carriers and Telesat Canada, provides long-distance telephone, printed message, and data telecommunications services, and establishes long-distance rates for its members, but it is not regulated by anyone as an entity. The interprovincial and international rates and services of the individual members are regulated by their respective regulatory authorities, federal or provincial. In other words, eight authorities regulate interprovincial and international rates and services. The specifics of the present system are found elsewhere in this volume.[2]

Yet for all the obvious untidiness and demonstrable lack of administrative coherence, the telecommunications regulatory system has not adversely affected, at least to date, the provision of telecommunications services in Canada. We possess a nationally integrated system that, in terms of availability, reliability, range of services, and costs, is reputed to have few equals. Although there may be some disagreement over the criteria and evidence for this claim, it is one that is generally acknowledged, most notably by the governments who seek changes in the regulatory system. It is worth noting that, for most of the past one hundred years, the development and operation of the

telecommunications system has been the product of industry, public and private, initiative, and enterprise. Government, especially the federal government, has played a minimal role in creating the quality telecommunications system that exists in Canada today.

For all its accomplishments and contemporary quality, the present telecommunications system faces tremendous challenges. The premises upon which the traditional relationships between carriers and users and among carriers have been founded are now subject to considerable debate. The very forces, technological and economic, that have shaped the present system are now responsible for generating the controversies surrounding the merits and adequacies of the existing system and its regulatory counterpart. For all its ungainliness, the traditional regulatory system worked well, if only because it did not adversely affect the development of the telecommunications system. Today, this cannot be taken for granted. Indeed, it is a central assumption of this paper that the existing telecommunications regulatory system will need to be revised because it is doubtful that it is capable of successfully coping with the political conflicts it will confront in the 1980s. If the regulatory system cannot cope, the potential is surely there that the provision of telecommunications services will be impaired.

The purpose of this paper is to offer advice and concrete proposals about how the current dispute over the appropriate jurisdictional allocation might be resolved in a manner that will be in the best interests of the various parties involved — traditional carriers, competitors, governments and, most essentially, the users of the system be they business or residential. It would be not only unfortunate but intolerable if the quality of the present system declined and the future impaired because of intergovernmental conflict. Second-order questions about which government should do what must not be permitted to harm what is, after all, the first-order priority, namely the satisfactory provision of telecommunications services. Individually and collectively, Canadians, their society and their economy, will be the casualties if this is the result of the continuing dispute. We recognize, of course, that the distinction between first- and second-order questions can be misleading. Debate over *which* level of government should have responsibility in an area sometimes is a surrogate for debate over *how* the responsibility should be exercised.[3]

This paper consists of three major sections. In Part I, we survey the background forces that have given rise to, and shaped, the nature of the intergovernmental conflict over the allocation of jurisdictional responsibilities for telecommunications. This part is subdivided into three sections. In the first, we examine the major technological and economic forces, their causes, and the stakes involved that are largely responsible for the intergovernmental debate. The second background

section will summarize the salient features of the federal-provincial context. The telecommunications jurisdictional issue has emerged and evolved as part of a much more complex set of issues and, accordingly, cannot be separated from larger questions about the nature of relationships between the different levels or orders of government. The third section of Part I examines the evolution of the specific telecommunications conflict. The debate over allocation of jurisdiction for telecommunications is itself part of a more general set of communications issues and negotiations. We will describe briefly the evolution of these debates and focus specifically on their relationships to the issue of which level of government should regulate what aspects of telecommunications. This survey will bring us to the summer of 1980 when the current proposals were placed on the bargaining table.

Part II provides an overview statement and analysis of the positions and values of the principal participants in the debate. In particular, the views of the federal and provincial governments, the common carriers, and the specialized carriers with respect to their primary concerns and their preferred alternatives will be provided.

Part III focuses on specific alternative proposals for resolving the existing jurisdictional impasse. In particular, we outline and analyse the proposals placed on the table for the September 1980 First Ministers' Constitutional Conference and any subsequent revisions. In addition, alternatives to both the central competing proposals are examined. The purpose of the analysis is to examine the extent to which the principal values and interests of the major parties can be satisfied by the individual proposals. Part IV provides the conclusions.

I. Background

This section provides an overview of what are, in the author's perspective, some of the most salient aspects of the background to the current dispute. The section is not meant to be an historical exercise. Public policy issues as complex, and in an environment as dynamic, as telecommunications do not, like some mushrooms, spring full grown overnight. Their roots are complicated; their relationship to their environment is normally most intricate. They are nurtured, and contaminated, by a host of forces. A failure, therefore, to place an issue in its context and to appreciate the continuing relevance of "external forces," however far removed at first glance, would be naïve reductionism and a disservice.

Telecommunications Revolution: Technological and Economic Causes and Stakes

While communications, broadly speaking, have been an issue in federal-provincial relations for most of this century, the appearance of

telecommunications on the policy agenda is much more recent. Indeed it can be dated from the early 1970s.[4] The emergence of telecommunications as a cause of conflict in intergovernmental relations is the direct result of the impact of dramatic technological and economic changes that have occurred in the past quarter of a century. One need not subscribe to much of the wide-eyed speculation about individual applications to accept the contention that we are in the throes of a dynamic and comprehensive change that may well rival the industrial revolution in its social and economic impact.

It is now commonplace to suggest that we are currently undergoing an "information revolution" that will radically transform our society and economy from one with an industrial base to one based on information.[5] While a full discussion of the forces driving this revolution is not necessary for our purposes, two in particular require comment. The first comprises the vast complex of major technological developments and innovations in telecommunications involving satellite technology, fibre optics, lasers, digital transmission, and electronic switching.[6] Among the many benefits of these and other developments are improved transmission quality and reliability combined with significant cost reductions. The second major force has been the merging of communications and computers, a merger that has produced various neologisms such as telematics, informatics, and the far less euphonious compunications.[7] This convergence, which brings together the transformation in telecommunications with the equally important advances in computer technology and science, entails the combination of communications functions and information processing. As one commentator summed up this development, "telecommunications systems are extending and integrating their use of computers for storage of information, conversion of electronic signals from one form to another, switching, and network control. Computers increasingly interconnect through communications networks to provide their users with access to more computing power and sources of information."[8]

Familiar clichés have been introduced that suggest the significance of such developments. Telecommunications have assumed such a vital infrastructural role that they are now described as "the railways of the future" or "the central nervous system of society." It should not be surprising, therefore, that such dramatic technological changes should give rise to important public policy issues. The issues that must be addressed fall into two categories.[9] In the first place, there are those issues that fall under the rubric of telecommunications policy, or policies *for* telecommunications, that is, those issues that pertain to the nature of the telecommunications infrastructure itself. Secondly, there are those issues that address larger concerns pertaining to the relationships between telecommunications and other sectors of the

economy and society. These are issues that involve *the use of* telecommunications for the attainment of other objectives in sectors such as banking, publishing, and manufacturing. We shall deal with both categories of issues in turn.

The technological transformations in telecommunications challenge the basic assumptions and call into question the central public policies now governing the provision of telecommunications services. Except for the first few decades of telephony, telecommunications policy has been based on a few integrated assumptions.[10] One of these has been that only one company can economically serve a single area and, therefore, telephone service is best provided on a monopoly basis. A related assumption is that a single company should be responsible for providing end-to-end service. The third cornerstone of traditional policy is that the pricing of telephone service should be based on a value of service rather than a cost-of-service pricing system.

Each of these assumptions is now under considerable attack. As a result of technological changes, the boundaries of telephone monopoly have broken down as there are now a variety of competing transmission modes and systems, some of which require connection to the traditional system, while others offer the potential of completely bypassing the existing telephone network. Some of the new modes are microwave, satellite systems, and cellular mobile telephone systems. Of particular significance for Canadian public policy is the potential of cable television systems, which hitherto have been treated as part of the broadcasting system, to act as a local distribution system in competition with the telephone system.

The principle of end-to-end control is under similar attack. In recent years, policies prohibiting the attachment of equipment other than that provided by individual telephone companies have been questioned. Customers — encouraged by manufacturers and retailers — now seek to attack a host of devices ranging from their own telephones, to mobile equipment and answering devices and, most importantly, switchboards (PBX's) and word and data processors that communicate with others.

The erosion of the traditional monopoly provision of services — both in transmission and in equipment — threatens to undermine existing public policies — implicitly or explicitly accepted for most of this century — governing the costing and pricing of services.[11] The traditional pricing system for both within and between companies favours residential over business users, rural over urban users, and local over toll users. As implemented, the present system involves a complex network of cross-subsidization. The basis for this system, and the mechanism for subsidization, is the value of service-pricing philosophy and practices. Competition in the provision of telecommunications services is largely, if not wholly, incompatible with the present pricing system.

In short, the technological changes in telecommunications and related sectors will require comprehensive re-evaluation and reconstruction of telecommunications public policies. Johnson has provided a convenient listing of some of the most pressing issues that public policy must address.[12]

- Effects on technical integrity of the networks
- Cross-subsidization between monopoly and competitive services
- The proper scope of competitive entry
- Distributional effects on classes of users
- Adequacy of current institutional arrangements
- Effects on innovation and new services.

Anyone familiar with the existing system of public policies will recognize that dealing with the issues on this list will require fundamental revisions and adjustments in political relationships and roles in the telecommunications system. Those who are the beneficiaries of that system quite naturally will seek to protect their interests while competing with those who wish to acquire benefits or impose costs on others.

From the preceding, it is obvious that decision makers, public and private, face a complex agenda as they attempt to grapple with the demands for new policies for telecommunications. Unfortunately, public decision makers are denied, or more precisely they have denied themselves, the "luxury" of doing so in isolation, because of their decision to simultaneously confront the other half of the information revolution. They have chosen to address the myriad of conflicts related to the use of telecommunications services, that is, those pertaining to the relationships between telecommunications and other sectors of the economy and society. Although a strong case can be made that governments may lack the capacity to resolve such conflicts, and therefore they should best be left to market forces to resolve, it should come as no surprise to informed observers that telecommunications in Canada is being given a "governmental embrace." As many have noted, Canadians have traditionally a penchant for substituting a governmental presence for a reliance on market forces.[13] This is particularly true in, though not limited to, those sectors that are deemed to be vital to society such as transportation, broadcasting and, most recently, energy. Hitherto, telecommunications was largely exempt, particularly at the federal level, from an emphasis on the societal as opposed to individual impact. This has all changed, however, and in the past decade a whole industry had developed, particularly in and around the federal government, that has articulated the range of issues and alternatives that face Canada as a result

of the convergence of communications and computers and the advent of the "information society."[14] In this respect, it should be noted, Canada has not been alone as numerous countries such as Sweden, France, Great Britain, Japan, and the United States as well as international organizations such as the OECD have addressed similar concerns.

As in prior "governmental embraces" in other sectors, all of the Canadian reports emphasize the profound impact on the economy and society of the information revolution. Moreover, and again this is all too typical, there is an underlying consensus, if not unanimity, that stresses the dangers involved. As the authors of a recent report insightfully noted by way of a summary content: *"These studies were written from different perspectives and with different objectives, but all reflect the same anxieties about the vulnerability of Canada to the information revolution."*[15] The Clyne Committee report on the "Implications of Telecommunications for Canadian Sovereignty" is representative of such studies. In an analysis of one of the issues, albeit a central one, the committee suggested a number of the "dangers" involved if Canada does not introduce protective measures to limit use of foreign computing services and to restrict transborder data flows. Failure to do so, it was argued, will:

- Reduce Canadian control over disruptions in service resulting from technical breakdowns or work stoppages
- Reduce Canadian power to ensure protection against other events, such as invasions of personal privacy and computer crime
- Lead to greater dependence on foreign computing staff, which would result in lower requirements for Canadian expertise and a smaller human and technological resource base upon which systems specifically geared to Canadian requirements could be developed
- Jeopardize the exercise of Canadian jurisdiction over companies operating in Canada which store and process their data abroad
- Undermine the telecommunications system in Canada by the use of foreign communications satellites and roof-top receiving antennas for the importation of data into Canada
- Entail the risk of publication of information that is confidential in Canada
- Give rise to Videotex services based on foreign databanks, emphasizing foreign values, goods, and services
- Facilitate the attempts of the government of the United States to make laws applicable outside U.S. territory.[16]

Other studies emphasize similar concerns and the consequent need to develop appropriate public policies covering national sovereignty, employment, privacy, innovation and productivity, regional disparities, cultural survival, and a myriad of other matters.

While one need not share the Hegelian "undefined foreboding of something unknown"[17] that has come to envelop Canadian discussions of the information revolution, the enormity of the range of issues involved is undeniable. The ramifications of the changes we have described will be profound and pervasive in their impact. As in the case of telecommunications policy, the issues involved with determining policies for the uses of telecommunications raise fundamental questions about winners and losers and the magnitude of potential gains and losses from the policies developed.

Whether the issue is telecommunications policies or policies for telecommunications use, the question of winners and losers directs us to what, from our perspective, is the central question: who will decide? This is the quintessential political question. Technology that has radically transformed the nature of the economic relationships involved in, and affected by, telecommunications is also causing a political upheaval. Traditional political adjustments and relationships will no longer suffice and, therefore, the nature of the political game and the appropriate roles and rules therein have emerged as central issues. In the process the role of government in general has been fundamentally altered. The stakes are perceived to be of such a magnitude that government, be it federal or provincial, will no longer agree to restrict itself to a relatively secondary, primarily passive, role. Today, and in the foreseeable future, government is assuming a central role in determining the development and operation of the telecommunications sector.

The Federal-Provincial Environment: Conflicting Goals, Inadequate Processes

In an ideal world, public policy issues would arise separately to be addressed by decision makers on an individual basis. This is not an ideal world. Not only must decision makers cope with a comprehensive range of issues in the telecommunications sector, but such issues must compete with a host of other matters for attention and action. We have contended in the previous section that the stakes in the telecommunications sector are considerable. The significance of the stakes has brought the question "who decides?" to the forefront of the debate. In an earlier era much, if not most, telecommunications decision making resided in the private sector with government playing a secondary role. Today, given the stakes and the tradition of state activism, governments are not prepared to be in a subordinate position, satisfied with private decision makers making fundamental decisions not only

about the objectives and structure of the telecommunications industry but about the linkages between this and other industries. But we have eleven public sectors in Canada, one federal and ten at the provincial level. Thus the question "who decides?" has two dimensions involving the appropriate powers and prerogatives on the one hand, of the public and private sectors and, on the other, of the eleven public sectors.

In this section we advance a number of comments about the nature of the intergovernmental system and its health in Canada today. The purpose is to highlight those aspects that are most salient to the dispute over telecommunications. In particular we shall emphasize the competition over goals that now exists, not only between the two levels but within the provincial level. We shall also focus on some of the concerns that now exist about existing processes for intergovernmental consultation and decision making. To ignore the larger intergovernmental context and to fail to relate proposals for resolving the jurisdictional questions surrounding telecommunications to this context would be akin to building sandcastles on a beach: an enjoyable but ephemeral pastime. Indeed it is worth noting that whatever the soundness and utility of any proposal, it could still be easily swept away as politicians trade "fish for fibre optics" without due regard for the consequences for individual sectors. While avoiding the first error is the responsibility of those advancing alternatives, it is no less vital to caution those who will make the ultimate decisions that long-term needs must not be idly sacrificed for short-term gains, however immediately satisfying.

It is doubtful if any other period in our history can match the degree of intergovernmental rancour, acrimony, and pervasive distrust that have characterized the past decade. While it is true that there have been protracted tensions and bitter disputes in our past, for the extent of sustained conflict and scope of issues involved this period is unparalleled. Not only have other sectors such as energy, fisheries, and transportation shared the intergovernmental battlefield with communications, but the very structure of the system and its institutions have been at issue.[18]

While many reasons can be adduced to account for such developments, one of the more important causes has been the structural and attitudinal adjustments required as the status of provincial governments was altered from subordinate member, or at least junior partner, to one more equal to that of the federal government. After several decades of relative aimlessness and lack of purpose, the federal government emerged from World War II with a comprehensive policy agenda and a concrete set of policies, a new "national policy" in the words of Smiley.[19] To meet its objectives, the federal government successfully sought to become the dominant member of the federal system. Although it took some time, eventually a provincial counter-

reaction did develop. In part, the counter-reaction arose from the desire of provincial governments to acquire power and remove federal constraints. Another cause was that some of the provinces became dissatisfied with federal performance in a range of areas, especially though in general economic policy, which was not yielding the results claimed to justify federal dominance. Furthermore, some provinces rejected federal policies because of claimed discrimination. Some provinces, notably those in the Maritimes and western Canada, maintained that federal policies in areas such as transportation and tariffs, as well as in general economic policies, favoured central Canada at their expense. It was also alleged that even if any discrimination was not deliberate, nevertheless it did occur when different regional implications and effects were not adequately considered by national decision makers.

For many of the provinces, the only apparent alternative to perceived federal ineptitude and discrimination was to claim a much larger role and voice for provincial governments in decisions about goals and objectives. There were two methods by which an enhanced provincial role could be achieved. One was to force the federal government to retreat and remove itself from provincial areas of jurisdiction so that the provinces themselves could make the decisions. The other was to insist that the federal government allow the provinces a role in areas constitutionally assigned to the federal government such as international trade negotiations and national fiscal policy — in short, to do unto the "feds" what they had done for decades to the provinces: "intrude upon their jurisdiction."[20]

For the most part, although some provincial spokesmen might not agree, provinces have been largely successful in their attack on federal dominance. Provinces today are much more equal participants in the operation of the federal system than they were only two decades ago. Indeed, although western provincial premiers annually report on federal intrusions into their jurisdictions, a recent study, undertaken it should be noted for the Quebec, not the federal, government, concluded that "provincial penetration into predominantly federal sectors is more marked than federal penetration into predominantly provincial sectors."[21]

This comment underscores what is a major point for our purposes in the changing balance of power in the federal system. Whatever the relative distribution of power, a major change in the federal system in the past four decades is that the two levels of government have become rivals and competitors. This is the direct result of the penetration (or, as it is euphemistically called, interdependence) of one level of government by the other. The original design of confederation emphasized n only the separateness but, in Dehem's terminology, the complementary nature of the relationship between the levels.[22] Conflict was envisaged of course and this explains the inclusion of the

federal powers of disallowance and reservation. Competition between the levels of government in the determination of objectives and the provision of public services was not expected. Yet intergovernmental rivalry and competition are a fact of life today for many citizens and businesses. Telecommunications until very recently was relatively immune from such a development. The debate we have witnessed and the stakes involved suggest that both levels want to expand their power and neither level of government is prepared to surrender completely its authority in the field. Therefore, proposals for allocating jurisdiction must, as a priority, include mechanisms to accommodate and channel constructively any competition that occurs.

It is worth noting, in passing, that the structural adjustments we have discussed in the relationships between the two levels of government are often analysed in terms either of the growth of decentralization or more generally of "nation building versus province building."[23] While there is much merit in either approach, both ignore several aspects that are highly germane not only to telecommunications but to many other sectors of the economy and society that get caught up in intergovernmental strife. In the first place, it should be emphasized that while there has been undoubtedly some decentralization or "province building," the growth of provincial power has not always been at the expense of federal power.[24] The fact is that since World War II and especially since the 1960s, both levels of government have grown and grown tremendously.[25] The following comment by Dion underscores this reality:

> At the end of the last century, public expenditures in all countries represented a mere fraction (one to two percent) of the gross national product, itself ten times smaller than today's; whereas today public expenditures, even in so-called liberal systems, are of the order of 25 to 40 percent.
>
> Whoever we may be, whatever our profession, whatever the area of the country we inhabit, politics has invaded our lives and it is virtually impossible to escape its hold. This political invasion of our daily lives is a new phenomenon in history.[26]

In Canada, as exemplified in the debate over "nation building versus province building," such a process entails not simply politicization of society, however, but "federalization" of all public issues. In this regard Cairns' comment is instructive: "The accelerated politicization of society extends the consequences of federal and provincial jurisdictional differences to ever deeper and more profound levels of our existence. The sphere of society, or activity, outside the political, and therefore outside the federal system, experiences constant shrinkage."[27]

There is a further aspect of the debate over the growth of federal and provincial governments and their consequent competition that is

hidden by the concepts of province and nation building. This aspect is summed up in Cairns' terse comment: "contemporary Canadian federalism is about governments."[28] Elsewhere he offers the following explanation for this comment:

> In many cases, the impact of government on society is neither a response to demands from below, nor to directives of political leadership emanating from above. There is fairly widespread testimony that much of the output of government, by means of which an ever expanding ratio of who we are and what we are is parcelled out as federal or provincial, is both bureaucratically inspired and sensitve to bureaucratic interests. . . .
>
> The reality surely is that much of the penetration of society by government is a product of the internal dynamics of Leviathan. That these dynamics occur at the federal or provincial level of government, and therefore create a national or provincial dimension to the activity that is regulated, the income that is taxed, or the constituency that is serviced, is a result of the exercise of authority, and little else.[29]

In any debate over the allocation of jurisdiction for telecommunications, or for that matter any area, this dimension should not be overlooked, particularly when the inevitable result, whatever the final intergovernmental agreement, will be an expansion of the governmental role in telecommunications.

Whatever the motivations, provincial governments are clearly intent on building strong provinces and seeking to control and direct their own development. The consequences of province building have not been confined to the growth of competition with the federal government, however, because there has been an equally significant growth in the competitive relationships among the provinces. Such a development was perhaps inevitable given the logic of province building. If individual provinces want to promote their own development, interests, and goals and seek to do this by reducing the federal role and "patriating" decision making, the obvious next step is to attempt, at least, a reduction of the impact of as many external forces as possible. Other provincial governments are natural targets.

In itself competition among governments is not necessarily bad. There are indications, however, that provincial governments in their competition amongst one another are prepared not only to employ a wide range of anti-competitive devices to protect their citizens, but also, although there is less evidence of this, to engage in "beggar-your-neighbour" behaviour. Numerous studies have documented examples of policies and actions by individual provincial governments, aided and abetted at times by the federal government it needs emphasizing, which have constituted barriers to the free flow of goods,

services, and people within Canada.[30] The dangers of such actions have also been emphasized. Not only may provincial actions be self-defeating by cancelling one another out, but, more importantly, they may fragment and damage the national common market. Furthermore, they may weaken, as Safarian notes, the capacity of the national government to deal effectively with foreign governments.[31] The significance of interprovincial competition to a nationally integrated telecommunications system that must confront some extremely serious international pressures hardly needs stating.

Given the centrality of intergovernmental competition, of both varieties, in the contemporary federal system, process considerations, that is, concerns about procedures for resolving unavoidable conflicts and for mitigating the deleterious effects of competition, should be a priority. Unfortunately, the present system does not afford much confidence in this regard. Four points need to be made in this respect. In the first place, it is undeniable that a wide gulf now exists dividing the federal and provincial governments. Simply put, the problem at its heart is largely psychological: the provinces are paranoid about the federal government (and, as the wag put it, even a paranoid has enemies). The provinces clearly do not want to be supporting players in a federal system in which they have significant stakes at issue and in some instances a constitutional right to play a decision-making role. Yet the prevailing provincial position for some years has been that the federal government is prone to unilateralism and seldom offers meaningful consultations. It should be obvious that not all the blame rests on federal shoulders. The provincial demand for "adequate consultation" has often been invoked solely as a strategem for delaying and frustrating federal action.[32] Notwithstanding provincial "sins," much of the onus for their concerns can be traced to federal behaviour. Numerous studies can be cited to support the contention that, starting with the federal dominance following World War II, the pattern of consultation followed by the federal government was one in which no real consultation took place.[33] Federal consultation with provincial governments, to paraphrase Henry Kissinger, amounted to little more than "an exegesis of federal prescriptions." Indeed, notwithstanding horror stories about the ravages of decentralization, there is evidence that federal officials continue to be insensitive to changes in the relationships between the two levels of government. A 1977 study prepared for the federal government of Ottawa-Quebec relations found that many programme directors in the federal government could not provide a constitutional justification, other than the residual power, for their programmes.[34] Clearly improving the sensitivity of federal authorities must be a primary goal if the problems of competition and rivalry are to be managed effectively. This is particularly important in the telecommunications sector where

if any level of government has been active, it has been the provincial governments. The onus, however, rests not only on the federal government. If provinces insist on being equals in an interdependent system, provincial authorities must ensure that consultation is not a one-way imperative.

The need to be sensitive to the concerns of other governments relates to our second procedural concern. It pertains to the capacity of the federal government to reflect the regional diversities of Canada. There is now widespread agreement, shared not only by federal government task forces such as Pépin-Robarts and numerous other commentators, but also apparently by the Prime Minister, that paralleling the growth of competition between the federal and provincial has been a significant decline of the capacity of federal institutions to represent a broad national range of interests rather than those found in only one or two regions.[35] This concern reflects earlier claims that so-called "national policy" amounted to little more than policy for Ontario and Quebec. One of the consequences of the lack of effective regional representativeness within Ottawa decision-making circles is that provincial governments all too often claim they are the only legitimate defenders of provincial and regional interests even when matters are clearly within federal jurisdiction. The weakened capacity of the federal government to articulate truly national interests has threatened to undermine its legitimacy as a national decision-making institution.[36]

The third process consideration relates to the phenomenal growth in federal-provincial meetings and negotiations in the past two decades. Notwithstanding the central role that intergovernmental relations have assumed in our political system, the growth in that role has not been matched by the development of an effective set of decision-making rules to govern negotiations. Although federal-provincial negotiations are often referred to as constituting "a third level of government," they are really more akin to Carlyle's "anarchy plus the Constable." There are today no rules, at least none generally accepted, for the resolution of intergovernmental conflicts. One of the consequences of the absence of such rules is that unilateral action by governments is encouraged.[37] This must be a priority concern for those who wish to grapple with the endemic conflicts in the telecommunications sector.

The final procedural consideration that needs to be noted in terms of the general federal-provincial background concerns the role of independent regulatory agencies in the federal system.[38] In the past decade, provincial governments have been vocal critics of federal regulatory agencies. The brunt of their criticisms has been that because of their independence, especially when they are endowed with, or assume, a significant policy-making role, such agencies may

frustrate intergovernmental policy co-ordination and integration. As a result, provinces have focused on the problems of political control over regulatory agencies and have urged that their independence be confined. In general, they have argued that federal agencies must become much more sensitive to the positions of the provinces in the federal system. Given that regulation of telecommunications is a central component of the debate over the allocation of jurisdiction, this concern over the linkages between the regulatory process and the larger federal-provincial process is integral. Once again it should be noted, however, that while in the past the concern has been with federal regulatory agencies, as all governments seek to expand their regulatory controls, the basic considerations also involve provincial regulators.

The Telecommunications Dossier: Its Evolution to the Present

In this third background section, the goal is to review the evolution of the intergovernmental conflicts and negotiations on telecommunications issues in the past decade. Our purpose, before we turn to a more extensive discussion of the principal concerns of the major participants, is to ascertain from an analysis of the negotiations the emphasis placed by individual participants on specific issues, the linkages between issues and participants, and the nature of the factors affecting the relationships among participants. This is not meant to be an exhaustive account of the negotiations for our primary focus will be on the place of telecommunications issues in the conflicts, both in terms of the substance they contributed and the priority assigned to them. Appreciation of these aspects, it is suggested, is necessary not only to understand the failure of the governments to resolve their differences but to highlight those concerns of continuing relevance to the present debates.

In concluding the discussion on federal-provincial relations, the authors of *Instant World*, the federal overview of communications issues, wrote: "in short, federal and provincial interests in telecommunications are complementary rather than conflicting, and afford ample opportunity for constructive cooperation by all governments in Canada."[39] The ink, so goes the cliché, was not even dry when the naïvety of this statement became manifest. As soon as the federal government indicated that it was interested in, let alone prepared to move on, a number of communications issues, provincial governments prepared, individually and severally, not only to man the barricades to protect established territories but also to seek possible expansions. The resultant conflict, at least for most of the decade, was bitter and the differences largely irreconcilable. For our purposes, it is convenient to divide the negotiations into three phases: the pre-1973 preliminary skirmishes, the 1973–1975, and the post-1976 negotiations.

Prior to the first formal conference, a number of questions pertaining to telecommunications policy had been raised by provincial governments. In 1972, for example, the Alberta minister of telephones criticized the federal government's decision to allow CP Telecommunications to build a microwave extension within the province on the grounds that the province cannot afford dual microwave networks. The maritime provinces similarly objected to CNCP's construction of microwave facilities to serve a new trans-Atlantic cable of Teleglobe (then COTC). Those provinces that regulated or owned telephone companies were also concerned about the competitive threat posed by the federal government's creation of Telesat Canada as the monopoly carrier for all satellite communications. Finally, although no decision had been taken, the federal government had initiated an inquiry about interconnection policies. Non-federally regulated telephone companies, except for one, ignored federal requests for views, and at an interprovincial conference of ministers responsible for communications, a resolution was approved stating that interconnection was a provincial, not federal, responsibility. It is also important to note that the conference itself was the second one held, as the provincial governments, in preparation for the federal-provincial negotiations, laboured to forge a common position to present to the federal government.

For its part, the federal government in the early 1970s began to address telecommunications policy issues and to a lesser extent issues involving the use of telecommunications. Mention has already been made of the inquiry into interconnection policy. In 1973 two position papers were certain to cause concern in provincial capitals.[40] In both papers, the minister of communications indicated that the federal government was predisposed, subject to appropriate conditions, to liberalizing interconnection policies and practices. Similarly, although with greater qualifications, the federal government announced that it favoured a measure of competition in the provision of telecommunications services. Finally, and most explicitly, the federal government wanted a re-evaluation of the system governing interprovincial rates and services. The Green Paper (1973) noted that "since there has been no co-ordinated authority over the several undertakings that together provide telephone service in all parts of Canada, the recognition of a 'national dimension' in the network as a whole has been left largely to the discretion of the Trans-Canada Telephone System." It went on to comment that "there has in the past been little opportunity for expression of the public interest, in a national sense, in the orderly development of telephone systems in Canada."[41]

Given these conflicting positions, there was little doubt that the federal-provincial negotiations would provide an opportunity for a thorough airing of telecommunications policy issues. Yet that did not

occur. In November 1973, the first conference of communications ministers was held but it broke up within a few hours. All the tensions and conflicts in the federal system of those years were present and articulated. In addition to those provinces which wanted to prevent federal "intrusions" that challenged the *status quo* as far as provincial jurisdictions were concerned, all provinces saw communications as integral to "province building." Consequently they wanted a significant degree of control over areas previously federal and thus a transfer of decision-making power from the federal government. At t conference, provinces wanted to concentrate on jurisdictional transfers, but the federal government, while acknowledging a legitimate provincial interest in many areas, would only entertain discussion of administrative mechanisms and consultative procedures, at ministerial, official, and regulatory agency levels. Provinces, reflecting the lack of trust and good faith that had become endemic in federal-provincial relations, dismissed the federal consultative proposals as insignificant.

Two subsequent conferences held in 1975 were no more successful. At the first, the provinces submitted what was labelled a provincial consensus position.[42] Communications policy was vital to the provinces, they argued, because they "have responsibilities in the social, cultural, educational and economic spheres." Federal proposals were unacceptable not only because they "denigrate responsibilities historically exercised by a number of provinces" but also because they "do not recognize increased provincial decision-making." Building on these arguments the provinces put forward the following demands:

- Except for federal broadcast services, "provincial jurisdiction would extend over all aspects of cable distribution systems and services," cable distribution systems having been defined as "local broadband carrier systems."
- "Telecommunications common carriers having their facilities located substantially within the boundaries of a single province would be subject to the regulatory control of that provincial government." Furthermore, "upon the request of the provincial government concerned, the federal government should take all appropriate legal steps to transfer the regulatory jurisdiction over federally regulated telecommunications carriers serving the province; except CN/CP, Telesat Canada and COTC."
- "Questions such as development plans of federally regulated carriers, standards, frequency spectrum management, use of satellites and intercarrier competition having varying degrees of provincial, federal and national interest, therefore setting policies and resolving associated problems are the responsibilities of a

federal-provincial conference of ministers, within the framework of a federal-provincial agreement."

- Except "for those broadcasting services which are national in scope as would be defined by federal-provincial agreement," any province so wishing would have exclusive responsibility for broadcasting. Spectrum allocation would remain a federal responsibility.

Prior to the 1975 conferences, the federal government had issued a position paper (the Grey Paper) in which it had tried to formalize some of its consultative proposals. It had suggested a formal ministerial Committee for Communications Policy as well as an Association of Communications Regulatory Bodies. Furthermore, representatives of the regulatory bodies of Ontario and Quebec "could be entitled to participate in the proceedings of the federal Commission before its decisions are made."[43] The proposals also included the cryptic comment that "the Government is engaged in bilateral discussions" with British Columbia and Newfoundland with regard to the regulation of B.C. Tel. and the telephone service provided in Newfoundland by Canadian National Telecommunications.[44] This meant, as the minister subsequently pointed out, that he was prepared to consider transferring jurisdiction for B.C. Tel. and C.N. Tel. but not Bell.[45] Finally, the federal government indicated it was prepared "to discuss any practicable arrangements that the Provinces might suggest in order to give them a greater share in the process of licensing and regulating broadcast receiving undertakings."[46]

Neither set of proposals was acceptable to the other party. The federal minister called the provincial proposals "unrealistic" because they "would effectively remove the Federal Government from a substantial role in telecommunications."[47] The provinces, particularly Quebec, were not prepared to continue the discussions unless the federal government was willing to entertain the need to cede to the provinces some significant decision-making powers. The result was that the July 1975 meeting ended in the same fashion as its predecessors, with no progress made on any of the issues plus a reinforced degree of animosity among the participants.

The nature of the federal-provincial negotiations changed substantially following the failures at the 1975 conferences. Negotiations did not end but became much more focused. For our purposes the most important feature of the post-1975 negotiations was that telecommunications policy issues, as we have defined them, were relegated to a distinctly secondary status on the agenda. For several years after 1975, the federal-provincial negotiations concentrated almost exclusively on two issues: the delegation of some degree of responsibility for cable to the provinces, and an enlarged degree of political control over the federal regulatory agency, the CRTC.

It is our argument that the debate over jurisdiction for cable did not revolve around telecommunications policy issues. This is not to deny that most provincial governments that wanted to acquire some degree of jurisdiction for cable did so because they were concerned about the role of cable *vis-à-vis* their regulated telephone carriers. These provinces were concerned about the negative impact of any enhanced cable system, that is, a system that went beyond the provision of broadcasting to include the distribution of non-programming services, on their telephone companies. In short, they were concerned about the introduction of some degree of competition via cable systems.

Notwithstanding such concerns, it was the federal definition of cable that dominated the negotiations, a definition rooted in broadcasting, not telecommunications concerns. The federal government's overriding objective was to thwart what were perceived to be threats to the integrity of the Canadian broadcasting system. Cable was such a threat, notwithstanding the extensive efforts of the CRTC, because the growth of cable had, in Ottawa's eyes, opened the floodgates to American programming and fragmented the Canadian market.[48] "The development in an orderly manner" of Canadian broadcasting and consequently "the future of Canada's television industry — private and public" were threatened.

After 1975, the federal government decided, as it had suggested in the Grey Paper, that if it could control the provision of basic programming services, it was prepared to negotiate with provinces to cede to them control over other aspects of cable regulation. In the negotiations leading to the Canada–Manitoba Agreement of 1976, and the subsequent negotiations on proposals to implement that section of new federal telecommunications legislation enabling the federal government to enter into agreements with provincial governments for the sharing of federal powers, the cable-as-broadcasting perspective was dominant.[49] At no time in the negotiations did the federal government show any concern for the potential role of cable as a general distribution system and, therefore, for the telecommunications policy issues involved.[50]

The second issue that dominated the post-1976 negotiations was the degree of political control to be exercised over the CRTC. The independence of the CRTC had been a long-standing concern of provincial governments and increasingly became one for the federal Department of Communications, and not solely for federal-provincial reasons. Of all the federal regulatory agencies, the CRTC had shown the least sensitivity to provincial interests and concerns prior to 1976.[51] Indeed, the commission was insensitive to the concerns of the federal minister of communications as he participated in delicate negotiations. As if to remind both the provinces and the minister where authority rested in Ottawa, the CRTC issued its first position

paper on pay television just prior to a federal-provincial conference for which the issue was on the agenda.[52] The CRTC policy requiring ownership of all hardware by the licensee was criticized especially by those provincial governments that owned or regulated telephone companies. The hardware ownership policy represented those "homogeneous policies that were not adaptable to the diversity of the regions," and despite provincial demands, the CRTC would not vary it.[53] Indeed, when the minister signed the Canada–Manitoba Agreement allowing for telephone ownership of the hardware, the CRTC issued decisions that did not totally comply with it. This prompted the western premiers to note it underlined "the necessity of binding the regulatory agency to accommodations worked out between governments."[54]

The Green and Grey Papers in 1973 and 1975 had announced the federal government's intention to subject the CRTC to a greater degree of political control on policy matters. At various times, ministers had commented on the problems raised by the CRTC's independence. Mme Sauvé, soon after becoming minister of communications, questioned whether it was "acceptable for a non-elected body to create major irritants in our relations with Government to have no control over them."[55] In her defence of the proposed Telecommunications Act, reducing the independence of the CRTC was always one of the three main components of the legislation.[56] In the negotiations following the introduction of the legislation in April 1977, particular attention was addressed to this aspect, as all provinces, except Quebec, endorsed the proposal.

It was only after a general consensus had developed on the cable delegation and agency independence issues that other issues were given more attention. In particular, starting with the 1978 federal-provincial conference, questions related to telecommunications policy and, to a lesser extent, policies using telecommunications became priority items on the agenda. It is worth noting that the CRTC played a major catalytic role in the re-emergence of these issues. In 1976 CNCP applied to the commission to order Bell Canada to allow the interconnection of its private-line and data service systems with Bell's network. The hearing on the application began just a month before the 1978 conference. A year later the CRTC issued its decision ordering such interconnection.[57] In addition, in 1977 the CRTC had issued its first terminal attachment decision in which it began the process of liberalizing Bell Canada's policies on customer-owned equipment.[58] Further impetus would be provided by the CRTC's announcement in June 1978 that it would "give prompt and favourable consideration to applications by cable television licensees for the use of their systems to provide new communications services of a non-programming nature."[59] Perhaps the most significant "push" that the individual

governments received was the October 1978 CRTC decision to carry out an extensive inquiry into TCTS rates and practices.[60] The CRTC listed seven issues that it expected the inquiry to address, issues that included the central telecommunications policy questions. They were as follows:

1. Whether the settlement procedures employed by the TCTS member companies are fair and reasonable and in the best interests of subscribers and the public
2. Whether the rates charged on a cross-Canada basis for each of the TCTS services, including those of Telesat Canada, are just and reasonable
3. Whether the terms or restrictions upon which services or facilities are offered by the TCTS members, including Telesat Canada, are reasonable and do not confer an unjust advantage on any person or company
4. Whether the relative treatment by TCTS of competitive and non-competitive services is just and reasonable
5. Whether the TCTS construction program is reasonable, and whether the information generated and employed in the planning of TCTS facilities and services is appropriate and sufficient
6. Whether TCTS, including Telesat Canada, is sufficiently responsive to the demand for the transmission of programming and other information services at a reasonable cost
7. What the information requirements of the regulatory agency should be in regard to future TCTS rate cases.

The CRTC's decision, which was announced in July 1981 and caused considerable consternation in provincial governments, was immediately appealed to the federal Cabinet.[61] The most important aspects of that decision from the provincial point of view are discussed below.[62]

Governments realized that, depending on the decisions made by the CRTC on these matters, they could be effectively bypassed and fundamental policies made for them by the federal regulatory agency. Accordingly, at the 1978 conference, a federal-provincial working group on "competition/industry structure in the telecommunications industry" was established. The group was instructed to "address the policy issues surrounding the industry's structure and competition, and to develop policy principles or criteria, which would ensure that telecommunications services in Canada are provided in a manner consistent with the public interest."[63] In October 1979, the report of the working group was discussed at another federal-provincial confer-

ence. The working group was able to reach a consensus on a statement of policy objectives and on a set of policy principles. There were, however, few firm conclusions in the report that recommended further study for most of the contentious issues. Moreover, as several ministers noted, there was considerable ambiguity, inconsistency, and not a little conflict within the objectives and principles. As the minister from British Columbia noted, "the Report appears to incorporate principles favouring and rejecting competition and as such I do not find it very helpful."[64] He recognized that given the range of opinions among governments on the merits of monopoly and competition, it would be difficult to develop "a useful consensus." As a result of the discussion, no decisions were taken; the ministers simply "approved, as a basis for further discussions," the report and instructed the group to examine and develop additional proposals.[65] A similar result awaited a report on an industrial strategy for telecommunications prepared by the federal and Ontario governments.[66] The report was noted and a working group was established to examine the issues. Further work by either group was suspended, however, by the change in federal governments in 1980 and the subsequent call for a major round of constitutional negotiations on a list of twelve priority subjects, one of which was communications.

In short, after almost a decade of negotiations that included six federal-provincial and five interprovincial conferences and innumerable ministerial and official meetings, the results were minimal. With the exception of the tentative agreement in 1978 to delegate to the provinces some responsibility over cable systems, there was no substantive federal-provincial agreement on either the allocation of roles and responsibilities for the levels of government or on general policies for telecommunications. Indeed, telecommunications issues, expected at the beginning of the decade to be central, received scant attention except in the last two years. When they became a priority item, the governments were unable to arrive at any useful, workable conclusions. The failure of the negotiations underscores a point made in the preceding section about the absence of effective decision-making rules at the federal-provincial level. Without any rules, indecisive discussions can only result, barring the willingness of the federal government to act unilaterally. This it has not been willing to do, with the result that despite its intentions, new federal legislation has not been enacted. It is also worth noting that while the governments bickered, the basic issues did not disappear. The result has been what both levels of government have criticized — policy making by an independent agency. The CRTC has been thrust into, or willingly accepted depending on one's point of view, such a role. By virtue of its precedent-making decisions on system interconnection, terminal attachments, and most recently interprovincial rates and services, the

CRTC has occupied a large part of the territory that, because of their collective incapacity to act, governments have not been able to control.[67]

II. Alternative Values and Objectives: The Participants' Perspectives

In this section we have a relatively straightforward goal. We want to answer a simple question: why do the various participants want jurisdiction for telecommunications allocated between the levels of government in the manner they propose? To develop the answers to this question we shall ignore the dynamics of the negotiations with all the consequent stresses and distortions to survey the major arguments and perspectives. Such a survey should allow us to identify the primary values and objectives that the participants wish to see incorporated in any regulatory system. To organize the analysis, we shall employ the distinction advanced in a previous section between telecommunications policies and policies employing telecommunications, recognizing, of course, that the two are not as mutually exclusive as the distinction may suggest. Of the participants in the debate we shall examine the views of the federal government, the provincial governments, collectively and in various combinations, and the telecommunications carriers, both common and private. The perspective of the cable industry will also be included because of the potential of that industry to become an alternative to, and hence competitor for, traditional telecommunications distribution systems. The profiles of the respective governmental positions shall end with a statement of the position advanced at the September 1980 First Ministers' Constitutional Conference.

An obvious shortcoming of the following is the failure to deal with the values and objectives of two parties who have vital stakes at issue in the debate. Those parties are telecommunications consumers, residential and business, and telecommunications equipment manufacturers. Our failure to present their "side" is not intended to minimize the importance of their legitimate interests but is the unfortunate result of the rather constrained time limits that governed the research for the study. These limits resulted in a concentration on those participants who have readily ascertainable positions. Neither consumers nor manufacturers, because of their diffuse character, met this condition. It is hoped, nevertheless, that the failure to include their positions does not unduly bias the analysis and that their interests are not sacrificed in favour of the "institutional" participants whose views are considered.[68]

The Federal Position

A review of the arguments and positions advanced by the federal government over the past decade suggests very strongly that it predicates its preferred allocation more on policies using telecommunications than telecommunications policies *per se*. In its first official major policy statement on the subject, this emphasis was apparent as telecommunications policy-related matters was fifth in the federal set of five priorities. The Green Paper of 1973 stated that the objectives of communications policy should be to:

- Safeguard, enrich, and strengthen the cultural, political, social and economic fabric of Canada;
- Contribute to the flow and exchange of regional and cultural information;
- Reflect Canadian [identity] and the diversity of Canadian cultural and social values;
- Contribute to the development of national unity; and
- Facilitate the orderly development of telecommunications in Canada, and the provision of efficient and economical systems and services at just and reasonable rates.[69]

A similar emphasis on the importance of telecommunications for other policy concerns is found in the statement "Computer/Communications Policy," in which it is stated that the public policy goal is to ensure that computer/communications systems evolve "in such a way as to emphasize the national identity, the achievement of major economic and social aims, both national and regional, and the maximization of Canadian influences and control over the key activities and services."[70] This emphasis is also common to studies and reports commissioned by the federal government such as *Branching Out*, the report of the Canadian Computer/Communications Task Force, and *Telecommunications and Canada*, the report of the Consultative Committee on the Implications of Telecommunications for Canadian Sovereignty.

The centrality of federal concerns for the linkages between telecommunications and other public policy concerns was made manifest in the proposed Telecommunications Act.[71] This legislation is the clearest, most authoritative declaration of federal priorities for telecommunications regulation. Section 3, which provides the statement of Canadian policy objectives for telecommunications, contains eighteen objectives, of which eight pertain to telecommunications. They are the following:

a. Efficient telecommunication systems are essential to the sovereignty and integrity of Canada, and telecommunication

services and production resources should be developed and administered so as to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada.

b. The radio frequency spectrum is public property that should be administered in the public interest and in accordance with international agreements and conventions to which Canada is a party.

c. All Canadians are entitled, subject to technological and economic limitations, to reliable telecommunication services making the best use of all available modes, resources and facilities, taking into account regional and provincial needs and priorities.

d. Telecommunication links within and among all parts of Canada should be strengthened, and Canadian facilities should be used to the greatest extent feasible for the carriage of telecommunications within Canada and between Canada and other countries.

. . . . . .

n. Telecommunication systems and services in Canada, other than the broadcasting undertakings referred to in paragraph (e),[72] should be effectively subject to Canadian control through ownership or regulation.

o. The rates charged by telecommunication carriers for telecommunication facilities and services should be just and reasonable and should not unduly discriminate against any person or group.

p. Innovation and research in all aspects of telecommunication should be promoted in order to improve Canadian telecommunication systems and to strengthen the Canadian industries engaged in the production of broadcast programming and the manufacture of telecommunication systems and equipment.

r. The regulation of all aspects of telecommunication in Canada should be flexible and readily adaptable to cultural, social and economic change and to scientific and technological advances, and should ensure a proper balance between the interests of the public at large and the legitimate revenue requirements of the telecommunication industry.

To contend that the federal government based its jurisdictional claims primarily on grounds of policy objectives employing telecommunications systems and services is not to argue, however, that telecommunications policy issues were ignored completely. They were not although they did appear to be secondary considerations. The statements cited above include objectives for telecommunications policies, namely a concern for an economic, efficient telecommunica-

tions system. In the Green Paper (1973), there was extensive discussion of some of the priority concerns of the federal government in this respect. The two following quotations sum up the general federal concerns:

> . . . since there has been no co-ordinated authority over the several undertakings that together provide telephone service to all parts of Canada, the recognition of a 'national dimension' in the network as a whole has been left largely to the discretion of the Trans-Canada Telephone System. . . . Although a commendable degree of co-ordination and standardization has been achieved by TCTS since its formation in 1931, there has in the past been little opportunity for expression of public interest, in a national sense, in the orderly development of telephone systems in Canada.[73]

In the Grey Paper (1975), the federal government expanded on some of the concerns that it believed were central to the "national dimension." The following extracts illustrate the federal perspective:

> The contemporary means of transmission for telecommunications services are such that even though the physical facilities may be situated within a single province, the services themselves potentially, and in most cases actually, extend beyond the limits of that province. Thus, while particular facilities may be purely local in a physical sense, they provide services that connect all the provinces with each other and with the outside world, and therefore represent the components of a Canadian system which amounts to more than the sum of ten provincial systems.
>
> . . . no government in Canada has been in a position to give comprehensive attention to the current operations and future development of the Canadian telecommunications system as a whole.
>
> . . . all modes of telecommunications have both local and extra-provincial aspects. . . . means must be found to maintain the orderly development of telecommunications across Canada. . . . there is an urgent need for agreement on cooperative arrangements that will enable better account to be taken of provincial concerns while avoiding the fragmentation of Canadian telecommunications systems and protecting the interests of Canada as a whole.
>
> There is a need to ensure that the planning and rate structure of the Canadian telephone system be more effectively scrutinized by the federal and provincial governments on a cooperative basis, particularly with regard to interprovincial services and services between Canada and the United States.[74]

In both the Green and Grey Papers, the federal government discussed some of the specific items that it deemed relevant to the "national dimension." They included rate-setting principles and practices, conditions governing the provision of new services, controlling from cross-subsidization between regulated and non-regulated services, the interconnection of competing systems and the attachment of customer-owned or provided equipment, and finally the circumstances under which new entry into the telecommunications system might be regulated.[75] In our discussion in Part I, we emphasized that matters such as these are central to fundamental questions about the structure and behaviour, as well as the objectives, of the telecommunications system. Hence they involve critical elements in the development of telecommunications policies.

Although the preceding recognizes that the federal government has addressed telecommunications policy issues, it is our judgement, nevertheless, that such issues were secondary concerns and that federal priorities entailed the identification of problems, stipulation of goals, and development of policies for the use of telecommunications. The Green and Grey Papers merely provided discussion of areas of concern. They did not provide any firm guidance on what the federal government deemed to be its priorities and goals in terms of the policy issues that are central to the telecommunications infrastructure, the relationships between its components and between providers and users. The federal government has not provided authoritative statements of its position on the appropriate mix of competition and monopoly or the distributional effects on classes of users that will result from any changes in the present essentially monopoly-based system. It is true that it has endorsed, by not rejecting, decisions of the CRTC on industry-structure-related matters, but such action is hardly a substitute for a clear statement of government policy. Furthermore, the proposed Telecommunications Act, which can be expected to be the guide for telecommunications policy perhaps for several decades at least, is essentially silent on these matters. Finally, the willingness of the federal government to entertain the delegation of cable systems to provincial governments without any evident concern for the potential role of cable distribution systems within the national telecommunications system as long as broadcasting goals were protected is further evidence of the low priority of telecommunications policy issues within the federal government.

At the September 1980 constitutional conference, the federal government did not make the distinction discussed above. Prime Minister Trudeau based his position on the following argument: "what goes on within a province should be provincial; what is interprovincial or international should remain federal" (Appendix E). The federal position was based on the assertion that there is a national dimension

to, or national interest in, telecommunications, and the intraprovincial, interprovincial principle ensures that the national dimension will be respected. In his prepared notes, the Prime Minister did not elaborate on the details of the "national dimension," but his comments during the discussion emphasized once again the pre-eminence of considerations relating to policies employing telecommunications. In his opening remarks, the Prime Minister stated that the federal position was simply this: "because our country is so diverse we have to ensure that means exist to preserve its unity, not only in practical terms, but in terms of the value system, in terms of the exchanges between various parts of the country."[76] Subsequently he stated that he believed that "it is good and it is necessary that the federal government exercise power over communications so that indeed there be a spirit of common nationhood, a series of common values which can be preserved and diffused. That is the philosophical basis on which we think that communications cannot be given holus bolus to the provinces."[77] At one point, Mr. Trudeau did refer to a specific telecommunications policy issue when he rejected the provincial demand for control over interprovincial services. He replied: "Here again I answer as I did on international trade, we cannot see a constitution which would permit a province to have the authority to interrupt telephone services between provinces to some other part of Canada, to some other part of the world."[78] Similarly, he defended federal authority over cable companies serving more than one province on the grounds of "the principle of interprovincial and international trade, ensuring the existence of the Canadian common market."[79] In short, although there was no discussion of specifics, the federal position was justified in terms of national dimensions and the national interest in transborder, intranational, and international communication activities and systems.

The Provincial Positions

Notwithstanding the "Best Efforts Draft" (Appendix D) for the allocation of jurisdiction for communications that was supported by all the provinces, the provincial position is clearly not monolithic. This is not surprising given the range of interests, values, concerns, and objectives that characterize the individual provincial governments. In this section we shall employ a broad distinction between those provinces that now regulate the major telephone companies within their jurisdiction and those that do not. Again it must be recognized that the former group is characterized by diversity on some of the major issues. Nevertheless, given the commonality of some of the positions, grouping them does not unduly distort their positions. Where appropriate, major differences within this group will be noted. With respect to the second category, we shall separately discuss the

positions of the individual provinces, namely British Columbia, Ontario, and Quebec.

Provinces Now Regulating Telephone Companies

Aside from the obvious consideration that no government seldom willingly agrees to surrender a power that it possesses, there are many reasons advanced by those provinces now regulating telephone companies — and such regulation covers both intra- and interprovincial aspects -- for their opposition to an enhanced federal regulatory role.[80] In the first place, they emphasize that the performance of the telecommunications system has been highly satisfactory under the present distribution of responsibility and that there is little specific criticism made of that system. They contend that the onus is on those who advocate change to prove the necessity for it and that this has not been done. In particular, they argue that, notwithstanding "ambiguous phrases" employed by the federal government about the "national dimension" that is lacking, the federal government has not attempted with specific criticisms and concrete proposals to establish that there is a compelling need for a new system to regulate interprovincial rates and services.

Perhaps the most fundamental objection of these provinces is that they believe that the distributional consequences will be dramatic if the federal government gains jurisdiction over interprovincial rates and services, particularly if it entails an increase in competition. Provincial spokesmen emphasize the central role that interprovincial toll revenue plays in the overall revenue position of the telephone companies. One indication of the importance of toll revenue is found in

Table 1
PERCENTAGE TOLL REVENUES (INTER- AND INTRAPROVINCIAL) OF TOTAL OPERATING REVENUES OF TCTS MEMBERS

Provincially Regulated Companies	Alberta Government Telephones	67.3
	Island Tel	56.1
	Manitoba Telephone System	59.9
	Maritime Telegraph and Telephone	57.4
	New Brunswick Telephone	58.7
	Newfoundland Telephone	63.0
	Saskatchewan Telecommunications	66.4
Federally Regulated Companies	Bell Canada	47.7
	British Columbia Telephone	58.3

Source: TransCanada Telephone System, *Statistics 1980*.

Table 1, which provides the latest information on that percentage of operating revenues of the members of TCTS, except for Telesat, derived from toll revenues. These figures, however, do not tell the whole story because toll revenue includes intraprovincial and interprovincial revenues. Although there are no authoritative figures available that would disaggregate the toll revenue category, some individual company spokesmen at various times have suggested that interprovincial toll revenues are vital as they can contribute from 30 to 45 per cent to the total revenues of some companies. For other companies, such as Bell, a much larger proportion of revenue is derived from intraterritory toll services.

Provincial representatives maintain that if federal regulation results in a cut-back in the contribution made by interprovincial toll services, there will be serious equity impacts. The concern arises because of the value-of-service pricing system for telephone services and the concomitant subsidization of residential rates. Nova Scotia, in its evidence for the recent CRTC "TCTS" proceeding, underlined the importance of this issue when it suggested that the first principle of the TCTS Revenue Settlement Plan should be to "contribute to the attainment of universal availability of basic telephone service throughout Canada."[81] Various provincial spokesmen have argued that this principle will be threatened by federal regulation of interprovincial rates and services particularly, but not solely, if the federal government permits the introduction of competition in the system. Federal regulation, it is claimed, will inevitably lead to an erosion in the revenues that the telephone companies employ to subsidize residential services. Consequently, not only will this necessitate an increase in local residential telephone service rates, but the increases might be so significant that the principle of universal accessibility to telephone service will be threatened.[82]

Distributional considerations are central to provincial concerns about federal regulation of interprovincial rates and services. They are not the only concerns, however, for provincial authorities fear that a federal role in planning the "orderly development" of the telecommunications system will inevitably mean a significant loss in provincial decision making and influence. This is a particular concern in the prairie provinces that own their telephone companies. They believe that there is a danger that federal decisions on matters such as new services, interconnection of systems, and new entry may not only lead to an expensive duplication of facilities but, more importantly, will result in federal priorities dictating provincial priorities in the provision of telecommunications services.

Closely related to this concern is the fear of the alternative decision makers. Provincial spokesmen are concerned that federal decisions will be impervious to provincial and regional needs and objectives.

They cite, as an example, the difficulties in obtaining a change in the cable hardware ownership policy, which they perceive as being designed to deal with the problems cable companies faced in Bell Canada's territory.[83] Furthermore, they cite as a particular cause for concern the emphasis within the federal government on those policies, which one official called "grandiose schemes," that would employ telecommunications as a policy instrument. From the provincial perspective, it is one thing to have a clash of objectives based on whether a monopolistic or competitive industry structure is more efficient and to confront the equity impacts that may result. They reject as being unacceptable, however, a federal role that will emphasize ambiguous concerns about national sovereignty or national unity and seek to direct industry behaviour to satisfy such concerns. One official cited as indicative of the potential federal approach the recommendation in the Clyne Committee report, which stated that "the high level of long-distance telephone rates, an outgrowth of the uncoordinated regulatory process in the industry, is a barrier to national communication and understanding."[84]

The provincial position is also heavily influenced by their perception of the Canadian Radio-television and Telecommunications Commission. For most provincial spokesmen, the CRTC continues to be an agency "out of control." In their perception, the CRTC has aggressively sought to expand its role and extend its jurisdiction. In so doing, it is argued, the CRTC has assumed managerial, policy-making, and regulatory responsibilities that should rest with the management of federally regulated carriers, elected federal authorities, and provincial governments and their agencies. For provincial spokesmen, the recent inquiry on TCTS-related matters is ample evidence to support their indictment of the CRTC. In their view, the CRTC was attempting not simply to determine the fairness of the TCTS settlement for the subscribers of federally regulated carriers, but was seeking to regulate the entire TCTS settlement process and interprovincial rates and services. The CRTC's decision in this case did little to assuage provincial fears. The relevant aspects of this decision will be discussed below in relationship with TCTS members' views on the jurisdictional dispute.

Consequently, the provincial governments are concerned about the federal government embarking on major changes in the regulatory system by means of an agency insufficiently subject to political control. It will be recalled that one of the central points in the later stages of the intergovernmental negotiations was the need to reduce the scope for independent federal regulatory action. One of the reasons, therefore, for provincial demands for entrenching their position in the Constitution is that the federal government's commitment to employ the expanded directive power found in the proposed

Telecommunications Act in order to implement intergovernmental agreements, while necessary, does not provide a sufficient guarantee to provinces that their interests will be respected. It is claimed that there is already too much "buck-passing in Ottawa," especially by the Department of Communications, which provincial officials feel is too willing "to hide behind the CRTC." Provinces believe that once the negotiations are completed, if their jurisdictional paramountcy is not recognized, the federal government may not be willing, or may be unable, to live up to its commitments, which will not have the force of law behind them. All that the provinces will be left with, they argue, will be an administrative arrangement that can too easily be frustrated.

In terms of one of the alternatives proposed — two-tier regulation — the provinces, and this includes those that do not now regulate their telephone companies, are unanimous in rejecting the concept. There are two basic reasons for their opposition. In the first place, they believe that two-tier regulation is unworkable and, worse, would create an administrative nightmare for the carriers and serious difficulties for regulators. In rejecting such regulation, provincial spokesmen cite arguments advanced against the concept by the federal government at the outset of the negotiations. The Green Paper referred to "obvious difficulties" and stated that "conflicts are bound to arise about the ultimate impact of regulatory authority on the economic capability of the undertaking to provide service to the public." If anything, provinces contend that the Green Paper understated the situation when it concluded that "experience in the United States is not very encouraging for the development of a dual system of regulation of telephone service."[85]

Provinces are opposed to two-tier regulation as proposed, namely on an inter/intra split for another, perhaps even more basic, reason. That reason involves the factor discussed above, the significance of interprovincial toll revenues to the overall revenue situation of the carriers. It is argued that toll revenues are an essential element in the subsidization system that now exists for local residential rates. If the source of a large proportion of those toll revenues, namely interprovincial toll services, were subject to the regulatory control of the federal government, this would significantly reduce the discretion of provincial authorities to engage in the redistribution of revenues among classes of users that now exists. In an interview with the author, a provincial official expressed the dilemma in the following manner: "as long as long-haul traffic remains a low-cost phenomenon, then whoever regulates it has costing on his side when he wants to reduce rates. The interprovincial traffic is in a revenue box, however, with no room to manoeuvre." Provincial officials argued that provinces would be in a non-win situation with most of the costs while the federal

government had most of the revenues and consequent discretion. They view the possibility as constituting "regulatory cream skimming" with the federal government assuming the responsibilities for the lucrative, and hence relatively safe, in political terms, areas of service. If this happens, several provinces suggested that the federal government might as well have all the responsibility for regulating telecommunications.

Although the emphasis in provincial objectives is on the distributional impacts and on the development of provincial telecommunications systems, provinces also have some concerns about the impact of any jurisdictional changes on their abilities to employ telecommunications as a policy instrument. In the early 1970s, some provinces expressed concern about the regional impact of the "information revolution." In particular they sought assurances that just as Canada would not become a "terminal economy" — collectors of raw data and retrievers of information processed and managed elsewhere — so too all regions would share in any industrial and employment benefits, as well as the costs, of the emerging infrastructural role of telecommunications. Although this is a widespread concern of all provinces that regulate their telephone companies, it is a priority issue for the prairie governments that own their systems. The Saskatchewan government has defined as a goal for Sask Tel "to build an integrated provincial telecommunications system that will deliver all forms of signals and services," and to this end, Sask Tel is constructing a fibre optic network to meet the voice, video, and data needs of the province.[86] Similarly, Alberta has identified the data processing industry as "an important key to the future economic well-being and development" of the province and wants Alberta to play "a leading role in computer communications." In particular, Alberta is sensitive to the need to ensure that most data processing requirements of the Alberta oil and gas industry continue to be met within the province.[87]

Although both *Branching Out* and the subsequent federal policy statement "Computer/Communications Policy" recognized the vital interests of provincial governments in these issues and promised to collaborate with provincial governments in the development of policies, provincial governments are not assured by such promises. They are particularly concerned that if they lose a significant degree of jurisdictional responsibility for telecommunications, they will lose significant bargaining power and leverage. Moreover, given the regions involved, they are naturally suspicious about "national policies," however well intentioned, and fear that what they perceive to be the inevitable central Canadian bias will be the result of federal decisions.

Given the preceding, the lack of enthusiasm on the part of provincial premiers, which regulate telephone companies, for the federal position

in 1980 is understandable. The five premiers who spoke to the topic dismissed the federal proposal as a "non-offer" that meant "very little" because of the responsibility that they already possessed over their telephone companies.[88] Other than rejecting the federal proposal, there was little substantive discussion on the part of the premiers, and no suggestion that anything other than the *status quo* or the provincial "Best Efforts Draft" was acceptable.

Despite this position, and despite the initial point made in this section that the federal government has not established its case for changing the present system, some provincial officials, and they are by no means unanimous, now suggest that events are overtaking both levels of government. They suggest that the *status quo* is increasingly becoming unacceptable. In words similar to those employed in the Green Paper, these officials argue that it is no longer tolerable to have private decision makers, TCTS members, in effect make major public policies determining the provision of services and the flow of revenues. They acknowledge that there is a need for a thorough review of the distribution of funds and of the relationship of costs to revenues, revenues to rates of the TransCanada Telephone System. Similarly, these officials agree that there are national dimensions that are integral to the planning and orderly development of the system. These dimensions include rates, standards, services, and the relationship between competitive and monopoly services. Provinces all agree in principle that there should be no arbitrary or capricious barriers to the flow of communications and that the integrated national system should not be fragmented.

Where provinces disagree with the federal government is on the appropriate forum for handling these matters. With respect to interprovincial rates, for instance, provincial spokesmen reject unilateral federal action, maintaining that this is not an effective substitute for the present veto power of individual carriers. The carriers, it is argued, must return to their home province and increasingly are subject to provincial regulatory surveillance to ensure that provincial interests are respected. With respect to barriers to the flow of information, provincial governments have recognized the need for an arbitration mechanism but again reject federal dominance of such a mechanism. Their preferred alternative for handling the national dimensions is interprovincial co-operation and they question the need for a federal role.

Other Provinces

The three provinces that now do not regulate their major telephone companies have sufficiently disparate points of view that we shall discuss them individually.

British Columbia

From the outset of the intergovernmental negotiations on communications, British Columbia's position has been consistent. The province has sought to have jurisdiction over B.C. Tel transferred to it from the federal government, and, in fact, the previous NDP government raised the possibility of acquiring a degree of ownership of B.C. Tel. The province, therefore, vigorously supported the provincial "Best Efforts Draft" (Appendix D) because it endorsed such a transfer for both intra- and interprovincial operations. Although the final agreement was never struck, the federal government indicated from 1975 on that it was prepared to make such a transfer and its position in 1980 included such an arrangement, at least with respect to intraprovincial operations.[89]

There are three aspects of the B.C. position that merit comment. First, the province rejects two-tier regulation proposed by the federal government on identical grounds to those advanced by provincial governments. The second point is that British Columbia is sensitive to the potential fragmentation of the system by unilateral provincial actions. The provincial view is that there must be a mechanism for resolving conflicts in the event of self-seeking provincial behaviour leading to barriers that negatively impact on other provinces. One of the underlying reasons for British Columbia's position is its support for the introduction of competition in the telecommunications industry. British Columbia supported the CNCP interconnection application and, to a lesser extent, supports terminal interconnection. At the 1979 Federal-Provincial Conference, British Columbia stated that its basic principle was monopoly where necessary but competition wherever possible.[90] British Columbia's concern with potential barriers springs in part from a desire to prevent those provinces opposed to competition creating obstacles to frustrate its introduction and operation.

The third point to be raised with respect to British Columbia's objectives for the regulatory system pertains to TCTS. Within the provincial government there is a view that the Revenue Settlement Plan currently involves the compensation of some provinces and regions at the expense of others. In this view, British Columbia is currently a "donor region." The system, according to this argument, involves the redistribution of wealth and a taxation function, which it is argued is a function that governments alone should perform. Accordingly, British Columbia defends its jurisdictional position in part on its belief that government in general and British Columbia in particular must play a role in regulating TCTS to ensure the propriety of the transfer of revenues.

Ontario

If one were to base one's analysis of Ontario's position on the rather flippant comment of Premier Davis that Ontario has not "been seeking jurisdiction over Bell, we have enough problems," it would be easy to conclude that Ontario's support for the "Best Efforts Draft" was a "marriage of convenience," part of Ontario's pursuit of cable systems.[91] Such an assessment, however, would underestimate the significance Ontario has attached to the telecommunications debate and the important contribution Ontario has made to that debate.

Ontario has been an active participant in both the intergovernmental negotiations and the major federal regulatory proceedings on telecommunications matters. In both arenas, Ontario has contributed a distinctive viewpoint that deals with the central issues in the jurisdictional battle. In the first place, although Ontario supports the principle of universal service at affordable rates — the equity goal — it is inclined to put an equal, if not greater, emphasis on efficiency objectives. The latter emphasis has been shown by Ontario's concentration on developing what it perceives to be the preferred industry structure and conduct in telecommunications. In the various relevant regulatory proceedings, Ontario has basically adopted a pro-competitive posture, believing that competition is generally preferable to monopoly. In the intergovernmental negotiations, Ontario has stressed the same position and indeed was the only government to point out the failure of the proposed federal telecommunications legislation to address the issue of competition except in one instance, which was "excessively negative with respect to competition."[92]

The second cornerstone in Ontario's position is that it believes that there must be more effective regulation of interprovincial rates and services. In its submission to the CRTC on Bell Canada's TCTS rates, Ontario argued:

> . . . effective regulation of services and facilities furnished on a national basis is necessary. Such matters as uniform accounting systems; service costing methods; formulae for dividing jointly earned revenues; monitoring and audit procedures, including the construction program; the relative level of rate structures; and the appropriate level of contribution to support the provision of basic telephone service require some degree of regulatory oversight.[93]

It is Ontario's view that given the public policy issues involved in the determination of interprovincial rates and services, not only is it inappropriate to leave these to the carriers to decide, but Ontario must play a role.[94] The unarticulated premise of Ontario's position is that the present system expands the cross-subsidization between toll and local to give it an interregional dimension and that Ontario is the primary source of any subsidy. Ontario is also interested in the TCTS

Revenue Settlement Plan because it excludes Ontario's independent telephone companies.[95] Ontario, at least in terms of the relationship between Bell and Ontario independent telephone companies, is determined to obtain "a square deal." To this end, Ontario has amended its Telephone Act to empower its regulatory agency to impose settlement agreements.[96]

A final point to be noted is that Ontario supports the federal view that "the communications sector is a key area of Canadian technological sovereignty."[97] In particular, Ontario believes that it is crucial that an industrial strategy be developed that will promote and protect Canadian interests and industries in the communications sector. To this end, Ontario joined with the federal government to develop a set of recommendations and to encourage their provincial colleagues to establish a working group to study the issues involved.[98] Given the emerging close relationships between telecommunications and other industries and the obvious industrial and employment benefits at stake, Ontario's desire to play a central role in the development of policies employing telecommunications or other objectives is understandable. It is also central to Ontario's objective to ensure that the province plays an enhanced role in establishing telecommunications policies.

Quebec

The position of the province of Quebec on communications matters has been consistent for the past decade. Beginning with the working paper *Toward a Quebec Communications Policy* issued in 1971, and then the more comprehensive statement in 1973 entitled *Quebec: Master Craftsman of Its Own Communications Policy*, successive Quebec governments have reiterated the demand for an almost complete transfer of jurisdiction for communications matters from the federal government to Quebec.[99] In language and concept remarkably similar to that employed by Ottawa, the province has articulated its concerns about the threat to cultural sovereignty posed by modern communications technologies and the need for government control, albeit provincial, not federal, to protect society. In all the debate, however, there has been little discussion that specifically links telecommunications, as we are employing the term, to cultural issues. Indeed, in Quebec's initial statement on communications prepared for the 1980 summer round of constitutional negotiations, telecommunications was ignored completely.[100] During the September First Ministers' Conference, Premier Lévesque conceded that in Quebec's perspective, telephone-related matters were far from being the most important in the communications dossier.[101]

Notwithstanding this, Quebec has regularly demanded that the province be given control over both intra- and interprovincial tele-

communications rates and services. Behind this demand there have been several values and objectives that, in fact, are very similar to many of those pursued by most provinces now regulating their telephone companies. With respect to the monopoly-competition issue, for example, Quebec prefers a monopolistic structure. This position is based on several arguments. One is that the province believes that competition will be uneconomic and socially wasteful if it entails the duplication of facilities already available. Secondly, the province has argued that monopoly is not necessarily less conducive to innovation than competition. In fact, Quebec, in the CNCP application, contended that "the optimum use of resources in the telephone field can only be achieved under monopoly conditions," and concluded that it

> is convinced that a monopoly situation, together with the obligation to serve, constitutes the best method of providing the entire Quebec territory with the services required for the economic and cultural enrichment of its people.[102]

The third reason for the preference for monopoly is the priority the province puts on equity considerations. Foremost among Quebec's objectives is that the cost of basic telephone service should be at the lowest possible rate.[103] On the basis of these concerns, Quebec opposed the CNCP application and is opposed to liberalized terminal attachment because of the threats posed to cross-subsidization. With regard to the latter, in 1978 the Quebec minister argued, "not only do we feel that the total price the telephone subscriber would then have to pay would be higher than it is today, but we also believe that there is no economic advantage to be gained."[104]

With respect to the regulation of interprovincial rates and services, Quebec's position is similar in most respects to that of Ontario and British Columbia, although Quebec places more emphasis on the receiving end of the cross-subsidization system than do the others.[105] The province views the present system, even if the province had jurisdiction, as a form of non-regulation that needs to be changed to ensure that public, not private, decision makers are making policy decisions. In particular, Quebec is concerned about aspects of the TCTS Revenue Settlement Plan such as individual companies sharing revenues routed completely over its own facilities. Quebec shares Ontario's concerns, as well, about the relationship between TCTS and independent telephone companies, especially Quebec Telephone.[106]

TCTS Member Positions

For much of the past decade, the position of the majority of TCTS members on jurisdictional questions was consistent with that of the provincial governments who favoured provincial jurisdiction over most telecommunications matters. Although not the only reason, basic

to the support for provincial regulation was a preference for the *status quo* and a presumption that such regulation was equivalent to the preferred industry structure of the carriers. They believed that the introduction of both system and terminal competition could be more tightly controlled if the provinces regulated the industry. Furthermore, those seven carriers already provincially regulated thought such regulation would forestall any interference with traditional relationships and roles in the area of interprovincial rates and services.[107] Finally, a general concern pertained to what was commonly perceived to be CRTC regulation that appeared to infringe increasingly on many traditional management rights and prerogatives.

Although the carriers have not renounced their jurisdictional preference, in the past few years there has been a significant shift in their positions on the jurisdictional issues. In part, such a shift reflects what in the United States has been known as "the new realism." Competition, which was the real enemy rather than federal jurisdiction, is expected to be increasingly a fact of life in Canadian telecommunications. Despite provincial government objections, the federal regulator, as indicated previously, authorized CNCP's application for interconnection with Bell's network and a similar application is proceeding for B.C. Tel's. In addition, the federal regulator has liberalized the policies governing terminal attachment to federal carriers' systems, an area where all the provinces claimed jurisdiction. As if supporting carriers' most dire predictions, provincial regulators have also made pro-competitive decisions as in Alberta and Nova Scotia.[108] Even the courts in the case of Prince Edward Island have entered the fray and made a similar decision.[109] Recognizing the trend, some of the carriers have decided to seize the initiative by making applications to sell their equipment and to permit the attachment of customer-owned equipment. Bell Canada's 1980 application was the first in this respect and was followed by Alberta Government Telephone's February 1981 application.[110] Finally, the recent CRTC decision on the Bell and B.C. Tel.–TCTS related services applications, discussed below, which is now under appeal to the federal Cabinet, has forcefully brought home the recognition that the traditional TCTS–governmental relationship must be revised.

The present position of TCTS members on jurisdiction-related matters consists of the following seven elements, although it must be emphasized that not all of the members would necessarily endorse each element nor would they rank them in the same order. The starting point is an acknowledgement that, hitherto, there has been at best only light, and at worst, no effective regulation of interprovincial rates and services. Only recently have a few provincial regulators as well as the CRTC attempted to subject TCTS member decisions to

direct regulatory scrutiny rather than indirect analysis as part of the overall rate of return of the individual carriers. Members now recognize that they can no longer operate in the "splendid isolation" that characterized the first fifty years of TCTS's existence. Although not all agree, a number of industry officials concede that they have been acting as quasi-public decision makers, although they are quick to point out that the responsibility was assumed only because no one else, regulators or governments, was prepared to do so. They recognize that it has been the industry which has been responsible for making many of the equity-efficiency trade-offs so central to the development not only of the national system but to that of intraprovincial systems. This "continuing balancing act," as one company executive described it, is inherently a public policy-making role, at least in part. The industry accepts as legitimate the demands of others, especially federal and provincial governments, to play even the dominant role for those aspects that are governmental in nature. A related point, however, is that the industry believes that if governments are to play a role and that role, because of government objectives, results in an increase in costs for some parties, government, not industry, must be prepared to bear the brunt of any criticism that results. If public authorities choose to make the policy decisions, they must bear the responsibility and not be able to deflect any subsequent criticisms onto the industry.

Industry officials are sensitive to the potential for criticism because they believe that distributional issues are central to the conflicts between jurisdictions and can be expected to become even more important. They emphasize the distributional conflicts because of the belief that increased costs for some users are inevitable. In the present pricing system, there is generally agreement that long-haul rates are not related in any significant sense to costs. This is because long-haul rates are central to the system of cross-subsidization between categories of users now integral to the pricing system. In the industry's view, the value-of-service pricing philospophy and the concomitant cross-subsidization have been largely responsible for creating and encouraging competition. The long-distance rates, inasmuch as they are higher than costs would dictate, have made the system vulnerable to long-distance competition. If they are to meet that competition, then value-of-service pricing must, to a certain extent at least, give way to cost-of-service pricing. If this is permitted, it is argued that long-distance rates will drop and so will the extent of the contribution made by such rates to intraprovincial rates and services. Rates must, therefore, increase for local service although the extent of the increase cannot be stipulated. The major alternative to increased local rates is even more unpalatable. Industry officials expressed serious concern that they may not be allowed to move

toward cost-of-service pricing with the result that they will be expected to find the shortfall in revenues from their own sources.

The movement to competitive long-distance rates without any movement toward cost-based local rates is only one example of the conflicting demands that may occur in an area of divided jurisdiction. A concern for mitigating the serious adverse impacts of one regulator's decisions on activities subject to another regulator's authority is the third general element in the TCTS members' set of concerns. Although in the past few years the focus has been on the potentially harmful systemic effects of CRTC decisions, carriers do not view the CRTC as the single source of the problem. With the diversity of views and objectives, not simply between the federal and provincial governments but amongst the provinces themselves, there can be conflicting policies and objectives with the carriers, individually and collectively as a nationally integrated system, caught in the middle. One senior industry officer expressed this general concern "for a modern, integrated, national network of facilities providing a wide range of services on a national basis being fragmented or impaired by unco-ordinated regulatory actions." As several individuals noted, the potential for this can only become more prevalent as jurisdictions such as Saskatchewan and Manitoba amend their statutes in an attempt to protect what they perceive to be their vital telecommunications interests. The absence of uniformity in regulation and the growth of inconsistencies and conflicts in such matters as rates, terms of access, and conditions of service may not simply cause aggravations, the carriers argue, but will make it difficult to engage in long-term planning and may reduce the ability of the carriers to innovate. Furthermore, the problem for the carriers is not simply that of their relationships with governments and regulators. Some individuals suggest that one of the most serious consequences of interjurisdictional conflicts may be felt within TCTS. Not knowing what the rules are or who will eventually make them may lead to serious intercorporate conflicts that can undermine integrated planning as effectively as intergovernmental battles.

The CRTC's "TCTS" decision symbolizes and embodies the type of unilateral regulatory decision with serious spillover effects for other regulatory jurisdictions that concerns the carriers.[11] In the first place, it has major interregional distributional consequences because the CRTC ruled that the TCTS Revenue Settlement Plan should apply only if facilities of two or more members are involved. Consequently, the commission ordered Bell and B.C. Tel. to renegotiate the plan with other members to eliminate what it deemed to be an inequity for their subscribers caused by including revenues from Canada–United States and Canada-overseas traffic that used the facilities of only one member. The CRTC estimated that if Bell's Canada–United States

revenues were excluded from the TCTS settlement, "Bell would gain $40.1 million in revenues, while all other members would lose revenues totalling that amount, with the particular losses ranging from $1.1 million for Island Tel to $8.1 million for Sask Tel."[112] Although Bell subsequently informed the CRTC that the revenue gain to Bell would be much less because the commission had failed to deduct an appropriate amount of costs that Bell would not be able to recoup from the Revenue Settlement Plan, the CRTC decision appeared to support carrier and provincial government fears over the interregional distributional consequences of federal regulation.[113]

Equally important, some carriers believe that the CRTC's decision on revenues for services such as "Dataroute" threatens the availability of those services if revenues for traffic within a territory cannot be employed to offset the cost of providing that service on a national basis. A third concern is that the CRTC's decision to exclude the Bell–United States traffic revenue from the Revenue Settlement Plan may force all members to attempt to negotiate directly, rather than through TCTS, with the U.S. carriers. This could potentially undermine the negotiating position of Canadian carriers and lead to higher costs for all. The final aspects of this decision causing concern for the carriers were some of the orders involving Telesat Canada. The CRTC in particular ruled that the full discount offered to TCTS members was unduly discriminatory, that Telesat must offer partial channels and must not restrict the availability of its services to TCTS members and the CBC. All three aspects of the decision, which is under appeal as of writing, may force members of TCTS to re-evaluate their relationship with Telesat Canada.

The emphasis on the nationally integrated network is the fourth element in the carriers' perspective. Even more so than some provincial governments, carriers are sensitive to the need to protect the national dimensions of the telecommunications system. They recognize as legitimate the provincial claim that the federal government is not sensitive enough to local needs, but at the same time they argue that provincial governments often are not concerned enough about the national needs and national dimensions of the system. Furthermore, carriers are not optimistic about provincial co-operation to achieve national objectives because of the diversity in points of view and differing emphases in objectives among the provinces. Citing in particular the Manitoba and Saskatchewan legislative changes referred to earlier, industry officials suggest that such responses may become all too typical. The result, it is feared, will be a balkanized, fragmented telecommunications system.

If conflicting provincial policies are a major concern for the carriers, an equally important concern is the fifth element in the carriers' perspective. That element concerns the lack of openly articulated

federal government telecommunications policies. Carriers maintain that despite all the talk about national objectives, the federal government, after ten years, has not yet enunciated what it believes to be the major goals and objectives for national telecommunications policies. In this respect their criticism is similar to that advanced by the provincial governments. The federal government does not appear to have a coherent philosophy or set of objectives in terms of the appropriate degree of monopoly and competition, the relationship between the various telecommunications sectors, or between users and service providers. In the words of one industry official, the Department of Communications only has policies when CRTC decisions are released. This comment is germane to a second concern shared by both industry and provincial governments. For these parties, the federal government has abdicated its responsibilities and permitted, by default or by design, a regulatory agency to emerge as the principal policy-making authority within the federal government. Industry spokesmen object to this in principle because they maintain such a function legitimately rests only with elected authorities. They also object in practice to many of the specifics of CRTC regulation because, in the absence of legislated policy guide-lines, the industry believes that the CRTC has been permitted to enlarge its regulatory mandate significantly in such a way that the scope and depth of regulatory scrutiny and responsibility have been expanded. They stress that this has led to what they believe is an inconsistency, namely an increase in competition combined with an extension of regulation.[114]

There is a more general policy issue that is central to the carriers' perspective on the jurisdictional conflict. Telecommunications has become highly politicized because of this conflict and carriers fear an even greater degree of politicization because of the range of objectives that are being sought through the use of the telecommunications system. Frank Degenstein, a senior executive of Sask Tel, a Crown corporation it should be noted, was advancing a common industry complaint when he stated recently: "I believe that too many attempts are being made to use telecommunications carriers as instruments of public policy in too many areas. I think they should be regulated to achieve telecommunications objectives with respect to the delivery of telecommunications services, not to try to solve all of the problems of the country."[115] It is the industry position that the jurisdictional conflicts over appropriate telecommunications policies pose difficulties enough without being joined by conflicts over the employment of telecommunications systems. Such conflicts, it is argued, should be kept separate not only from the jurisdictional battles but also from whatever regulatory system that results. From their perspective, drawing on examples from other sectors of the economy such as transportation, it would be foolhardy to attempt to resolve both types of conflicts within the regulatory system.

The seventh and final element in TCTS members' set of objectives and interests is their fundamental opposition to two-tier regulation of the American variety, namely one regulator responsible for intraprovincial aspects and another for interprovincial. In their perspective, the future of telecommunications regulation is fraught with difficulties that will pose tremendous challenges to the capacity of the telecommunications system to perform effectively. Two-tier regulation, it is argued, is a sure recipe to guarantee disaster. It would be institutionalized fragmentation. Carriers in this respect share the objections of the provincial governments, but emphasize them even more so because they would bear the costs of being single entities responsible to two regulatory authorities. It is their contention that, in the past decade, there has been no successful challenge to the conclusion advanced by the federal government itself that there are such "obvious difficulties" in a two-tier system that it is not to be recommended. Accordingly, carriers conclude that whatever the settlement of the conflict over the distribution of responsibilities for regulating telecommunications, the problems of two-tier regulation must be avoided.

Other Carriers' Positions

Thus far we have limited our survey to the values and objectives of the federal and provincial governments and the carriers who are members of the TransCanada Telephone System. In this last section we want to describe the views of those participants who provide, currently or potentially, the competition to TCTS members, namely CNCP Telecommunications and cable distribution systems. There are, of course, other competitors such as radio common callers and paging companies, but, to date, competition involving them has been confined to within the territories of the individual carriers. If, in the future, the scope of the operations of these other competitors assumes an interprovincial dimension, it seems a reasonable assumption that their primary concerns will be similar to those now competing with TCTS members.

CNCP Telecommunications

CNCP's position on the jurisdictional problem is built on two central arguments. The first is that the quality of the present telecommunications system is, in part, due to the forces of competition provided by a company such as CNCP. Consequently, it is argued that such competition must not be stifled but, to the contrary, should be encouraged as much as possible. On the basis of this emphasis on the value of competition, CNCP is critical of the proposed federal Telecommunications Act because it suggests "that the entire telecommunications policy for Canada is to be achieved solely by regulation. Not a single word is said of the forces of competition in

achieving that policy, notwithstanding that they have contributed to the production of one of the finest telecommunications systems in the world!"[116] Elsewhere CNCP notes that "the Telecommunications Bill favours regulation and says nothing about competition, except in Clause 56 which is designed to restrict competition."[117]

The second basic argument advanced by CNCP is the national nature of the telecommunications system and particularly the national nature of CNCP operations. Consequently, not only must competition on a national basis be encouraged, but regulation, to the extent that it is necessary, must also be national. The following extract from the company's submission on the proposed federal Telecommunications Act sums up their position:

> The telecommunications services industry in Canada is, and must continue to be, national in scope. . . .
>
> Regulation of such enterprises in the interests of a healthy and efficient telecommunications system must be uniform and take into account national as well as local interests. Delegation of regulatory powers to ten provinces can only mean disparate regulation and emphasis on local rather than national interests. It would be costly and inefficient, and work against the development of the telecommunications system in the public interest.[118]

For CNCP this means that any division of regulatory responsibilities must avoid the creation of "any chequer board effect." By this the company means that regulation of national companies must be "uniform and even handed" and, above all, provincial regulation as it relates to national companies must not be allowed to create artificial regulatory barriers that could diminish any benefits to be derived from competition.[119] In particular, CNCP is concerned about terms and conditions governing access to provincially regulated telephone companies. CNCP's fear is that its national operations could be frustrated by unfair provincial terms whose national impact is not considered, let alone given prominence, in any regulatory proceeding.

Not surprisingly CNCP rejects as inappropriate for itself or any other national system any form of two-tier regulation. More importantly, CNCP rejects classic two-tier regulation and advocates a significant degree of integration of the regulation of those firms and services operated on an interprovincial, national basis. Two-tier regulation, it is argued, will provide companies operating on both an intra- and interprovincial basis an opportunity to employ the former to undermine effective competition on interprovincial services. Costing of services that does not adequately assess the relationships between intra- and interprovincial prices can permit firms to engage in anti-competitive pricing practices. For CNCP, any solution to protect national competition must entail a dominant federal presence. Only

with such a presence can Canada continue to enjoy the benefits of national competition by restricting the creation of artificial provincial regulatory barriers.

Cable Distribution Systems

Although cable distribution systems do not yet provide an alternative telecommunications distribution system with an interprovincial dimension, there are sufficient grounds to justify some discussion of their relevance to the jurisdictional conflicts. In the first place, it is now recognized that cable systems can have the capacity to provide many advanced local distribution services and, accordingly, be an alternative to the telephone companies.[120] Secondly, the emergence of regulatory-sanctioned large cable companies such as Canadian Cablesystems, which serves approximately 30 per cent of all Canadian subscribers, suggests that the potential may soon be realized, especially with the development of entities such as Cable Satellite Network, to integrate the provision of services of individual cable systems. Finally, given the centrality of the debate over delegating responsibility for cable in the past decade, the roles, actual and potential, of cable are of obvious relevance to our subject.

For the most part, the debate over which level of government should regulate cable systems has been dominated by broadcasting/programming issues that need not concern us. What is important for this paper is first the relationship between cable and telephone companies and, secondly, the interprovincial aspect of that relationship. Although initially the cable-telephone company relationship dealt mainly with the costs and terms of access for cable systems to telephone lines and poles, the links were expanded to cover more general issues involving cable hardware. It was in the prairie provinces, particularly Manitoba and Saskatchewan, where the relationship began to focus less on costs and more on the competitive aspects. The 1979 decision of the CRTC authorizing, on a trial basis, several cable companies to provide a number of non-programming services brought the issue of potential competition between two telecommunications systems to the forefront of the debate.[121]

Although cable systems have emphasized their role as an integral part of the broadcasting system, an effort has been made to protect their interests as telecommunications undertakings. A 1980 submission, for example, emphasized that the industry wanted recognition of its changing status, that cable systems "are much more than just passive undertakings for the reception and distribution of broadcast signals."[122] A report prepared for Canadian Cablesystems in support of its application to take over Premier Cablevision of Vancouver stressed the broader telecommunications role of cable. This report stated that cable's "transmission speed and inherent capacity should make cable

an integral part of the very necessary efforts to improve the information and data handling capacity of Canadian business" and that cable's role should be defined in terms of the broader context of the emerging "information society."[123]

The industry, in its submissions on the jurisdictional debate over cable, has stressed that given the wider role in the telecommunications system, cable and telephone are potential competitors and, therefore, artificial barriers must not be constructed that would pre-empt such a role.[124] To support this agreement, the following CRTC statement that encouraged cable companies to apply for permission to offer non-programming services is routinely cited:

> Although the two transmission technologies — coaxial cable and copper pair — provide distinct services into the home at present, new services may develop which could be provided by either technology. In such cases, neither technology should be burdened with artificial barriers preventing their development in a fair and reasonable manner.[125]

The industry consequently has suggested that any intergovernmental agreements governing delegation "should contain a clause recognizing the exclusive right of cable television operators to carry the traditional broadcasting and local origination services." A similar provision, it was suggested, "could be inserted to prevent cable television companies from carrying traditional telephone services."[126] The industry did not specify, however, the exact nature of either "local origination services" or "traditional telephone services," nor did it address the potential for "artificial barriers" arising from monopoly status for either.

Although there has emerged an increasing recognition that cable and telephone networks may be competitors within the telecommunications system, to date there has been almost no discussion of the potential interprovincial aspect of that competition. The provinces have emphasized their definition of cable as "local undertakings" and, after several years of negotiations, the federal government appeared to accept that definition with respect to non-programming services, that is, those services that are the source of cable-telephone competition. Industry spokesmen similarly, as in the previous comment about "local origination services," have chosen to downplay the larger territorial role that cable may play. Only in the consultants' report cited earlier is there some recognition of a larger role for cable "to develop *national* alternatives to the telephone companies for new services."[127]

Given the nature of this paper, it is not the author's place to develop a case for the industry to argue in the jurisdictional negotiations. Nevertheless, if we are to attempt to respond to the regulatory needs of

the future, there is a clear case to be made that there must be some recognition that cable may increasingly possess an interprovincial dimension. Cable systems hold the potential for transcending the local distribution characteristics that have come to dominate our perceptions of its roles and to possess significant interregional, national, and possibly international dimensions. Although the industry may have chosen not to make this argument, it is one that should not be ignored.

III. Assessment of the Alternatives

The purpose of this section is to examine the proposals for allocating jurisdictional responsibilities and offer an assessment of the extent to which the primary values and objectives of the major participants, as outlined in the previous section, can be satisfied or, at a minimum, respected. The two principal proposals are the federal position as presented at the September 1980 Conference of First Ministers on the Constitution (Appendix C) and the counter-proposal known as the Provincial "Best Efforts Draft" (Appendix D), which limit the discussion to only those aspects germane to telecommunications. In addition to these two proposals, while myriad others could be designed, we will focus on two alternatives only: the *status quo* and some form of shared allocation regulated by a joint federal-provincial agency. Unlike the two contending governmental proposals, neither of the alternatives requires constitutional change. This is, in fact, a major difference between the two sets of alternatives, around which we shall organize the assessment.

Before turning to the discussion of the alternatives, several introductory comments are in order. It is not our intention to base the assessments on a prior assessment of the validity of the individual arguments and positions of the participants. This would be virtually impossible for any single analyst to accomplish, especially because "validity" hinges, particularly in the case of the governments, in many instances on "non-factuals" and attitudinal and deeply rooted dispositions, the understanding of which is perhaps best left to experimental psychopathologists. In so far as the governments are concerned, the alternative that is adopted here is to accept the principle that both levels of government have legitimate interests that must be respected if there is to be a mutually satisfactory allocation of responsibilities. Furthermore, it is the author's view that the legitimate interests of either level are considerably larger than the other level appears prepared to concede, although also rather less than each has claimed for itself.

To be more specific, the following comments indicate what we believe to be the central interests of the governmental participants in the debate. The federal government's interests derive from the fact that we have, and must continue to have, a nationally integrated

telecommunications system. The TCTS member companies have identified this as as their fundamental objective, namely "co-ordinated planning and operations to provide a Canadian telecommunications system that furnishes efficient national and international communications services."[128] The federal interest, at a minimum, must be to ensure that there are no provincial barriers that could disrupt the provision of services on a national basis and to protect against spillovers from one province inappropriately causing burdens for others. The concept of a "free flow of information" within Canada suggests some of these concerns that justify a federal role.[129] But this role has much more positive aspects. If a pricing system is to involve an interregional flow of revenues, then the federal government has a legitimate interest in such matters. While the existing system has been remarkably effective at dividing up and distributing the benefits that flow from the pricing system, the introduction of competition threatens to undermine the basis for that system. There is, thus, a role for the federal government in resolving the inevitable conflicts that can be expected. More importantly, there is undeniably a legitimate federal interest in the determination of major policies for the telecommunications system. Given the existence of the national network, the federal government has national responsibilities that neither the telecommunications industry nor the provincial governments can adequately represent in the development of the appropriate industry structure. This is particularly valid given the central role that interprovincial rates and services and network access will play in shaping that structure.

Legitimate provincial interests are similar to those of the federal government. They are rightly concerned about the development of the most efficient telecommunications system within their provinces to ensure that their goals and interests are met. This concern is shared by all provinces and not only those now owning or regulating telephone companies. Moreover, although those provinces now dependent on the "contribution" that interprovincial tolls make to the provision of local services cannot claim "proprietary rights to the *status quo*," they can invoke some degree of "grandfather rights" to ensure that any transition is as equitable and tolerable as possible.[130] They can legitimately insist that if public policies accepted for most of this century are to be drastically revised, and that is what a move from value to cost-of-service pricing will do, then they have a claim to a role in that decision-making process.

If both levels of government have legitimate interests in the development of telecommunications policies, this is even more the case in the development of policies using the telecommunications system as a policy instrument for the satisfaction of broader social and economic goals. To acknowledge the legitimacy of the various interests is not,

however, to endorse the use of regulation by either level as the most appropriate instrument for the attainment of those goals. Indeed, it could be argued that much of the intergovernmental conflict could disappear if individual governments did not use regulation as such a policy instrument. In the absence of any commitment to restrain themselves, there is a need to ensure that the governments at both levels and, it bears emphasizing, within the provincial level do not work at cross-purposes. If this occurs, not only may the efforts of the individual governments be cancelled but the efficiency of the network may be eroded. Morever, intergovernmental regulatory conflict may impose severe constraints and even impossibilities on regulated firms.

Aside from these general comments, somewhat more specific points can be made in terms of assessment of the alternatives. In the first place, acknowledging the legitimate interests of the various governments does not necessarily mean that both levels of government need to be equally involved in all decision-making aspects. This caveat is applicable particularly to the federal government. It need not have a say in how provinces seek to satisfy their intraprovincial objectives, especially those of a distributional nature, so long as pursuit of such objectives does not have an undue negative impact on interprovincial or international aspects, which are the appropriate domains for federal interest. On the other hand, given the close relationship that has historically existed, and can be expected to continue, between what is done at the interprovincial level and attainment of intraprovincial objectives, a role for the provinces in regulating the former is justified.

Accordingly, it can be argued that a legitimate goal against which the proposals can be evaluated is the following: given the historic division of responsibilities and the fact that no convincing case has been made for a radical break with the past, regulatory responsibilities should be allocated in such a way that permits the maximum degree of freedom possible for individual provinces to pursue what they perceive to be their telecommunications objectives while providing for the protection of, and the means to attain, national objectives. If this goal has a provincial "tilt," it is because we believe that it is not necessary, or perhaps even appropriate, to have all major decisions made in Ottawa. Canada can benefit from a system in which there are several decsion-making centres. Such a system need not be incompatible with the larger interests, goals, and objectives of the nation, provided that in the event of major conflicts among and between participants there is a mechanism for conflict resolution in which national interests are respected.

This last point brings us to our second major point of departure for assessing the alternatives. There must be provision for an efficient and effective decision-making system. This point is not as trite as it

may appear. The past decade of negotiations on telecommunications issues, and innumerable other analyses could be cited in support, underscores the need to establish decision-making rules and procedures. Consultation and promises of co-operation simply do not provide sufficient incentives for effective decision making. The absence of accepted rules governing decision making adds to the costs of decision making in terms of both time and effort.[131] Far too often, in fact, no decisions are taken. Given the range of decisions that must be made, continued stalemate will mean that decision making may pass, as it has to some extent, to independent agencies such as the CRTC or to powerful centres, public and private, beyond our borders.

Proposals Requiring Constitutional Change

The 1980 Federal Proposal

For the 1980 round of constitutional negotiations, the federal government proposed the following distribution of responsibilities between the two levels of government:

Federal

- Exclusive responsibility over national and satellite telecommunications carriers (i.e., Teleglobe, Telesat, and CNCP)
- Exclusive responsibility over interprovincial and international telecommunications rates and services
- Exclusive responsibility over unspecified technical standards and interconnection of systems
- Exclusive responsibility over "national programme service" and non-Canadian programming carried by cable systems.

Provincial

- Exclusive responsibility of intraprovincial operations of "provincial" telecommunications carriers including Bell Canada, B.C. Tel, and Terra Nova Tel
- Exclusive responsibility for cable systems except for "national programme service" and non-Canadian programming (see Appendix B).

At a subsequent session, the federal government amended this proposal by proposing a joint federal-provincial board for certain interprovincial rates and services.[132] We shall limit our discussion here to the original proposal and leave comment on the change until we examine the fourth proposal.

This federal proposal for allocating responsibilities is unacceptable to all parties, other than the federal government. It would clearly

satisfy federal desires for a major role in the planning and development of the national telecommunications system, but it would do so by restricting the provinces to a minimal role at the interprovincial level and in fact would restrict their discretion at the intraprovincial level. Provinces have rejected the two-tier distribution proposed because it would dramatically shift responsibilities from most of the provincial governments to the federal government. Notwithstanding provincial regulation of intraprovincial operations, the scope of its jurisdiction would give the federal government considerable leverage to shape unilaterally the telecommunications system. There is, therefore, inadequate provision for the recognition of direct provincial interests in the federal proposal.

The provinces, and here they are joined by all carriers, national and provincial, reject the federal proposed allocation because of the confusion, cost, and inefficiency it is claimed such a two-tier distribution would cause the carriers. It should be noted that the federal government has not explained why a two-tier system is acceptable now when it was not in 1973. In fact, the introduction of competition has made two-tier regulation an even more dubious proposition than it was previously. This has been noted in the United States where, because of the changing industry structure and the related impact on regulating carrier conduct, there are proposals that will, in effect, abolish two-tier regulation.[133] This will be accomplished by extending the federal tier to include everything between exchanges, that is, federal jurisdiction will cover inter-exchange, not simply interstate, while the states would be confined to regulating intra-change operations. Carriers and provincial governments have made a persuasive case against two-tier regulation and, as the federal government has not sought to answer this case, their arguments are sufficient grounds for rejecting the federal proposal.

In brief, the federal government's 1980 proposal has little to commend it for serious discussion. It would dramatically revise the present distribution of responsibilities and confine provinces to an inferior role without, it needs to be noted, providing either detailed argument explaining how the present system has failed or specific justification for improvements that would result. The federal government limits itself to a statement of general principles, *with which we concur as do most carriers and some provincial officials*, but it has not established that the draconian changes in jurisdictional responsibilities are necessary to satisfy federal objectives. The benefits of the federal proposal are too unclear while the cost for provincial governments, carriers, and ultimately users, seem all too obvious.

The Provincial "Best Efforts Draft"

In response to the federal government's proposal, the provinces united to provide an alternative that they all endorsed. This proposal had the following allocation:

Provincial

- Exclusive jurisdiction over all telecommunications works and undertakings wholly situated within a province
- Concurrent jurisdiction with provincial paramountcy over all other telecommunications works and undertakings
- Exclusive jurisdiction over cable except for broadcast networks extending to four or more provinces.

Federal

- Concurrent jurisdiction with federal paramountcy over space segment of communications satellites
- Concurrent jurisdiction with provincial paramountcy over all interprovincial telecommunications carriers (see Appendix D).

The "Best Efforts Draft" also suggested that no provincial or federal law could disrupt the free flow of information and provided an arbitration mechanism to ensure this. The provinces proposed that "in the event that the laws of two or more provinces conflict so as to disrupt the free flow of information, one of the provinces may petition the Parliament of Canada to enact a law to resolve the specific conflict and such law shall prevail."

The provincial proposal is as flawed as the federal. In the first place, the provinces refuse to recognize that the federal government has legitimate interests in the development and performance of the telecommunications system. This is a valid comment notwithstanding the proposed concurrent jurisdiction because any exercise of federal responsibilities would be subject to a provincial override. Indeed the 1980 provincial demand is even more extreme than the 1975 consensus position because it calls for provincial jurisdiction over the "national" carriers — CNCP, Telesat, and Teleglobe.[134]

The "Best Efforts Draft" is flawed in perhaps an even more fundamental respect in that while it excludes an independent federal role, it fails to substitute, with one exception, any national decision-making alternative. That exception is provided for in the "free flow of information" clause. This clause itself is highly objectionable. Redress to the appeal mechanism is limited to provincial governments alone and, as worded, may be limited to only the provinces directly involved in the conflict. All others — federal government, carriers, or users — would not be permitted to invoke the appeal mechanism, and several

provincial officials in interviews were adamant in their opposition to broadening the right to appeal to include other parties. The appeal mechanism itself, an appeal to Parliament for a law resolving any conflict, is a rather dubious proposition. It is difficult to conceive of a more cumbersome, unwieldy mechanism. A law is an inappropriate device for specific conflict resolution. It is a measure of how confined a role the provinces sought to assign the federal government that it was Parliament and not Cabinet or the minister of communications or especially the CRTC that was made the appellate body. The result of provincial opposition to a significant federal role, however, was to design an appeal process that is unacceptable in both principle and practice.

Although the provinces made an effort to grapple with the free flow of information issue, the "Best Efforts Draft" fails completely to address the broader question of how national policies would be developed. There is an assumption that the demands of the nationally integrated network can be met by interprovincial co-operation, but the provinces have not provided any decision-making rules or processes for resolving interprovincial conflicts on questions such as rates and access. The need to provide a decision-making system, however, is crucial especially given the widely divergent provincial objectives. In this respect Sundquist's comment about the contemporary American Congress is equally applicable to Canadian provinces: "If one characteristic of [the provinces] of the 1970s has been the new assertiveness, another can be called the new individualism. And they are basically incompatible."[135] If the provinces were to gain the degree of control they have demanded, their "consensus" can be expected to disappear rather quickly. In the absence of defined decision-making rules, a voluntary approach emphasizing co-operation is profoundly unrealistic and unworkable. There are far too many incentives for the individual participants to engage in self-seeking behaviour for one to be optimistic that national, rather than parochial, interests will be served. One official expressed the industry consensus when he argued that the inevitable result of the provincial proposal will be an entirely unacceptable inconsistency of terms, rates, and conditions.

The provincial "Best Efforts Draft" is, therefore, perhaps even more unacceptable than the federal 1980 position. There is a refusal to acknowledge anything but the most narrow federal interests and, therefore, to concede a significant federal role, in the telecommunications system. Moreover, the failure to provide for an authoritative means for resolving interprovincial disputes suggests that, aside from the good intentions of the provinces, there can be little confidence that the national dimensions of the nationally integrated network can be adequately addressed, let alone respected.

Proposals Not Requiring Constitutional Change

In their contribution to this volume, Buchan and Johnston conclude that:

> In dealing with technologies and services that are constantly changing, we think it would be counter-productive to attempt to define in a constitution appropriate areas of jurisdiction. As the history of attempts to amend the BNA Act, or even to reach agreement on an amending formula, has so clearly indicated, it is much easier to amend legislation than it is to amend a constitution.[136]

We concur with this assessment not only on grounds of principle but also because of the unsatisfactory nature of both the principal proposals that do advocate constitutional changes. There is, nonetheless, the need for some solution to resolve the current intergovernmental impasse, particularly since we believe there is a serious danger that the efficient provision of telecommunications services may be impaired as a result of the continuation and possible extension of this conflict. Accordingly, we assess two alternative proposals that do not require any constitutional changes.

Status Quo

Although after a decade of intense negotiations about revisions in the allocation of responsibilities for telecommunications it may seem absurd to suggest that the present allocation may be a major alternative, it is not implausible that such a proposal may be advanced, particularly by the federal government. It has not yet been suggested but there are some indications that federal thinking may be leaning to the *status quo*. In a speech following the 1980 constitutional conference, Jean Fournier, a senior assistant deputy minister in the federal Department of Communications, made the following comment:

> The distribution of regulatory authority between the federal and provincial governments, irrational as it may seem to outsiders, has not impeded progress to this point, and there is no evidence that the Canadian public or industry, or any sizeable segment of either or both, is clamouring for change. Nor is there evidence that any change would result in users being served as well or better than they are today.[137]

Along a similar vein, a senior federal official suggested in an interview that the present allocation might be acceptable especially if the CRTC undertook "robust regulation" of federally regulated carriers, particularly on matters related to interprovincial rates and services.

The advantages of the *status quo* for the federal government are all too obvious. In addition to the national carriers, it would continue to regulate the two carriers that in combination provide approximately 75 per cent of all telephones in Canada and have a similar percentage of total operating revenues. Control over these carriers would give the federal government a solid "handle" on the industry in order to pursue national objectives. The *status quo* is increasingly unacceptable, however, to the provinces and equally so to the industry, especially if it entails a continuation or extension of the existing discord and uncertainty. The *status quo* would deny three provinces any direct role in the regulation of the industry, although it needs to be noted that only two of them have sought such a role.

The case against the *status quo* is even greater when one considers the potential impact on the national system. The assumption of the *status quo* proposal is that federal regulation of Bell and B.C. Tel especially with respect to system interconnection, terminal attachment, and their TCTS-related rates and services will give the federal government sufficient leverage to lead the national telecommunications system in the direction it chooses. While this may indeed occur, the potential for conflict and confusion should not be underestimated. In the case of system interconnection, for example, while some provinces may be following the federal lead, it is also possible, as is already the case in Saskatchewan and Manitoba, that some provinces may choose to go in the opposite direction. The result for a national carrier such as CNCP may be a fragmentation of its national system. If such a situation is not acceptable to either the carrier or its users, redress may be sought from the courts with court-imposed solutions the result. Such an alternative, while it has the advantage that it does resolve disputes, is extremely costly in terms of both time and resources and in the confusion that can exist while the issue works its way through the judicial system.

TCTS-related rates and services pose similar problems and the recent CRTC decision referred to earlier provides an excellent illustration of the range of problems that can occur. In the first place, neither the other members nor the provincial governments are compelled to automatically accept changes such as those ordered for Bell and B.C. Tel. If they do not do so, then the CRTC could either rescind the order or require the companies under its jurisdiction to bear the burden themselves until the issue is satisfactorily negotiated. The potential efficiency consequences of the latter for the federally regulated carriers are obvious. More important is the fact that the CRTC does not, and is not empowered to, regulate Bell and B.C. Tel as "national carriers," but it regulates them in terms of the "just and reasonableness" of their tariffs for their subscribers who are regionally based. Therefore, this means that the CRTC cannot concern itself

with the impact of its decisions on other carriers or their subscribers as its orders on revenue illustrate.[138] The result may be legitimate regional decisions that unilaterally undermine the national system and the provision of national services. The decision on Canada–United States rates, for example, may have the effect, whatever the legitimacy of the decision for Bell subscribers, of forcing all carriers to negotiate, where it is possible, their own "gateway" to the United States. This may not only add to the costs by fragmenting the bargaining power of TCTS *vis-à-vis* AT&T but may have a very negative impact on transborder data flows. Some carriers may negotiate agreements that do not reflect the national interest with the consequence that federal objectives in this area are undermined.

The *status quo* as an option whereby the federal government would seek to impose what it perceives as the national dimension and national objectives on the Canadian telecommunications system by virtue of its authority over the national carriers and the two largest "provincial" carriers may bring about the worst of all possible worlds. The provinces that now regulate telecommunications carriers can be expected to fight rigorously federal efforts to do indirectly what it cannot impose directly. The result may be retaliation and stalemate. Carriers will be caught in the middle of the intergovernmental battles, and their ability to plan the development of the national system will be seriously impaired by the disintegrative effects of unilateral actions, federal and provincial. Furthermore, by attempting to impose direction and objectives indirectly, the results may be the very opposite to those intended by the federal government. However large and central B.C. Tel and Bell are within the national system, they are but two of the elements. The other elements, most of which are under provincial jurisdiction, are just as vital and are integral members of the national system. The *status quo* would encourage conflict among the member systems and, in the long and short run, the national telecommunications system may be impaired.

Shared Jurisdiction With a Joint Federal-Provincial Agency

If neither the federal 1980 proposal nor the provincial counter-proposal are acceptable to either side or to members of the industry and if the *status quo* is similarly unacceptable, there is need for a fourth alternative. This alternative must, at a minimum, be based on a recognition that both levels of government have legitimate interests but should also provide the coherence and predictability that the industry deems essential. The concept of a joint federal and provincial agency sharing jurisdiction over those aspects that the two levels deem essential to their respective interests has the potential for a satisfactory alternative. The concept is not altogether novel. CNCP, in its 1979 submission on federal telecommunications legislation, advo-

cated a regulatory tribunal with federal and provincial appointees, and other industry participants have privately supported such a proposal.[139] The federal government during the summer round of negotiations similarly proposed the creation of a federal-provincial agency to regulate interprovincial rates and services.[140] Although provincial governments have not endorsed this alternative, a working group of provincial officials has been addressing the matter and several provinces appear to be receptive to the proposal.

There are four central aspects of the joint board alternative. They are legislative authority, responsibilities, appeals and policy directives, and finally membership. We shall deal with these in turn. Although, as Buchan and Johnston note, there has not yet been an authoritative judicial clarification of the jurisdictional question, it is our *assumption* that the federal jurisdiction over much of what is at dispute would be upheld by the courts.[141] Accordingly, we would argue that any joint board should be constituted under federal legislation. In addition, regardless of the constitutional dimension, it seems neither practical nor feasible to do so under eleven statutes. This does not mean that the federal government should unilaterally legislate but, in fact, should draft the legislation with the degree of concern it has shown for provincial agreement in the last few years in the development of the proposed Telecommunications Act. The enabling statute in particular should contain a statement of national telecommunications principles although, unlike Buchan and Johnston, we would not agree that the principles in the proposed act are a useful starting point. These principles concentrate almost exclusively on policies for the use of telecommunications as an instrument for the attainment of a broad range of social and economic objectives. The proposed act is silent to a very large degree on principles for telecommunications policies and much work, therefore, remains to be done. Indeed, it may be more conducive to a successful implementation of the joint board alternative if, in fact, the legislation avoided the use of regulation as an instrument for the attainment of broad-gauged public policies and concentrated attention on a more narrowly focused set of objectives and functions.

In terms of its responsibilities, the joint board would have the power to regulate interprovincial and international rates and services including the interconnection of national or interprovincial systems to intraprovincial networks. With respect to the latter, it would be empowered to order interconnection and to specify terms and conditions, including access charges. It would also have jurisdiction over the interconnection of network-addressing equipment. Although the initial federal proposal was that the board's authority would be limited to interprovincial rates and services "provided by the provincial carriers," it would seem logical, given the interdependence of the national

and provincial carriers, that the board's jurisdiction would cover both. Accordingly, this would give the board responsibility for regulating CNCP and Telesat Canada. Furthermore, there seems little justification for not giving it jurisdiction over Teleglobe. Finally, although the role of cable systems as interprovincial carriers has not been addressed, it would also seem appropriate that if cable develops an interprovincial dimension, the joint board proposal should be responsible for regulating such aspects. Under our joint board proposal, intraprovincial aspects of rates and services would be the responsibility of the individual provinces. This would require transferring appropriate jurisdiction over B.C. Tel, Bell Canada, Terra Nova Tel, and Northwest Tel to the relevant provincial governments. In the case of Bell, it would entail a division into Ontario and Quebec operations. This should not be as difficult as it may seem because it is largely in accord with existing company practices.

A joint board with responsibilities over the central interprovincial and international issues would appear to offer the best hope of satisfying the interests of both levels of government. The federal government would thus be in a position to represent the national dimension not only with respect to potential internal barriers or conflicts, but in the development and implementation of policies governing both industry structure and behaviour. For their part, provinces would have a decision-making rather than advisory role on interprovincial matters having a vital intraprovincial impact. Furthermore, all provinces would have jurisdiction for intraprovincial operations.

The split between intra- and interprovincial aspects would appear to be in conflict with the preferred industry allocation of responsibilities. It is not, in any significant respect, however, for several reasons. The industry generally rejects one-tier provincial regulation as incompatible with the needs of the national system. One-tier federal regulation is equally objectionable, as it should be to all but the most immodest. The industry rejects two-tier regulation of the classic American variety, which entails an attempt to compartmentalize the industry into two sections that are then assigned to separate regulatory authorities. The proposed joint board arrangement, while it would entail a split between intra- and interprovincial aspects, would not be a complete break because of the integration of at least some of the regulators. This would reflect the interdependence of the two functions. Essential to the joint board proposal is the requirement that the provincial members of the board be drawn from those who regulate intraprovincial telecommunications and preferably should be the chairmen, or their designates, of the provincial agencies. It is the opinion of industry officials, as well as those provincial spokesmen who support the joint board proposal, that this condition is necessary

both to bring a recognition of the intraprovincial impact to bear on interprovincial decisions as well as to provide a measure of uniformity and consistency in the treatment of both aspects.

The third major aspect of the joint board pertains to the issues of appeals and policy directives. With respect to the latter, over the period of the intergovernmental negotiations, the principle was accepted that politically accountable authorities must have the means by which they can transmit authoritative guidance on policy matters to a regulatory agency. The policy directive was deemed to be an appropriate mechanism. In the intergovernmental context, a corollary was that consultation among governments should occur when a directive is required for matters having a significant intergovernmental dimension. This corollary derived from the recognition of the necessity to consult on policy matters in general and on the appropriate policy principles for telecommunications legislation in particular. Accordingly we believe that federal telecommunications legislation should not only include a power for policy direction but also require intergovernmental consultation at least on matters under the jurisdiction of the joint board prior to the issuance of any directive. This need not exclude, however, the type of wider consultation and participation that many have recommended should accompany the use of the directive power.[142] With respect to appeals from regulatory decisions, if it is deemed necessary to have such appeals to the federal Cabinet in the case of the joint board, a similar provision requiring intergovernmental consultation prior to the disposition of any appeal would be appropriate.

A major hurdle, the development of an acceptable joint board alternative, concerns the fourth issue: the membership of any joint board. The federal proposal called for an eleven-member agency, six appointed by the federal government and five by the provinces on a regionally representative basis.[143] Although there is yet no firm provincial position, some officials have indicated that the provincial demand will be for an eleven- or thirteen-member agency with the provinces appointing ten members and the federal government either one or three members.

It is highly likely that neither proposal will be acceptable to the other level of government. Provincial officials have already dismissed the federal proposal because, with a majority, the federal representatives could dominate the board. Similarly, the federal government can be expected to reject the provincial proposal as not providing an adequate guarantee that federal interests will be effectively represented. If both levels stick to these positions, any negotiations on a joint board arrangement would appear to be doomed to failure.

There are two alternatives. One would be that whatever the membership ratio, decision making by the board would have to be

unanimous, and thus each government would possess a veto. Such a joint board would be a governmental equivalent to TCTS. Whatever the extent of the success of the unanimity rule in TCTS, and some industry officials suggest that the costs have been high, such a rule would be inappropriate for a regulatory agency. It would add considerably to the decision-making costs and, in fact, as it does in federal-provincial negotiations, would be a barrier to decision making. Accordingly, unanimous consent as a requirement for joint board decision making should be rejected.

The second alternative is to adapt the provincial proposal to make the membership ratio more equal. This alternative would ignore the total number of members, which could be ten provincial and five federal, to concentrate on the fact that most regulatory proceedings would be handled by panels of members. The essence of this alternative is that the federal government does not require a majority of members but should be able to protect national interests if it had one less than the provincial members. In other words, a matter involving two provinces would have a panel of two provincial and one federal representatives. The size of the panel could be expanded depending on the number of provinces involved, although for manageable decision making on a national issue a maximum of perhaps seven or nine members would be preferred.

The assumption that the federal government does not need a majority is based on the recognized diversity in the provincial views and objectives. Lacking a majority, the federal representatives will be required to persuade at least one provincial member to support the federal viewpoint. The provinces should be able to accept such a proposal because it does not ensure automatic federal dominance particularly because the federal representatives will be independent regulators. They will not, therefore, be in a position to employ federal resources to engage in log-rolling, a tactic that provinces fear the federal government is far too willing and able to use when it lacks necessary "votes." In the event that the provincial representatives are unanimous, a case can be made that such unanimity, given the diversity of interests involved, should be accepted as constituting as representative a view of the national interest as that provided by federal representatives. In large part, the strength of such an argument rests on the widely acknowledged inadequacy of existing federal institutions to reflect the diversity and different interests of the various regions of Canada. If this were not the case, the argument would have far less merit.

Of the four proposals this paper has considered, and they represent the major alternatives, the joint board proposal would appear to offer the most hope for resolving the intergovernmental impasse that now exists. It is a proposal that recognizes both levels of government have

legitimate interests that must be respected. Moreover, it emphasizes that relationships between the governments must be established in a manner that does not sacrifice the interests of those subject to governmental authority whether they are the providers or the users of telecommunications services.

Although a proposal for a joint board to regulate interprovincial and international telecommunications services may initially appear to be rather bland and uninspiring, in one respect it is far more radical than any of the alternative proposals. It is radical because it would compel the governmental actors to substantially restructure their philosophies and their relationships in dealing with one another. It challenges the prevailing wisdom in much constitutional discussion, if not practice, which continues to stress the need for separateness in power and responsibility. This said, one must still be modest about the potential of any joint board. It cannot be emphasized often enough that structures and processes such as those represented by the joint board alternative are not solutions in themselves. At best, they can "structure" relationships and roles and, by so doing, provide an opportunity and an avenue for mutually acceptable behaviour and solutions. Seizing that opportunity, and travelling that avenue in the final analysis rests on the goodwill and the commitment of the participants. Absent such goodwill and commitment, no structure, however elegant and refined, can provide answers to pressing public policy problems such as those we are only beginning to encounter in contemporary telecommunications.

IV. Conclusions

Change as radical and pervasive as that which the telecommunications system is undergoing is seldom without its casualties. In Canada, one of the first has been the regulatory system. The traditional premises of this system have been challenged, and, consequently, traditional relationships among carriers, users, and governments have been undermined. Given the stakes, not only in the telecommunications system itself but also in the relationship between telecommunications and other sectors of society and the economy, developing a new regulatory system has inevitably been fraught with enormous difficulties.

The last decade has witnessed the attempts by federal and provincial governments to respond to the emerging information revolution and its impact on the regulatory system. Their responses have ranged from seeking to entrench the *status quo* to attempting to secure the dominant role for themselves. To date, all such efforts have failed and the intergovernmental conflicts over the appropriate allocation of jurisdictional responsibilities continue. To the extent that such failures can be traced to a single cause, it is this: neither level of

government has been willing to make anything more than a token acknowledgement of the legitimate interests of the other and to concede a role commensurate with those interests. The two levels of government have insisted that they must have exclusive jurisdiction over designated matters in order that they alone can control the economic, social, and political change that now characterizes telecommunications. In short, they have invoked a claim to sovereign rights over telecommunications. To the extent that the governments do recognize a need to accommodate the interests of others, they would do so only in an arrangement that they can control.

Sovereignty, as the quotation with which we began this paper suggests, is an increasingly outdated concept in the telecommunications sector. Technology has brought about a convergence, a sharing, of the traditional roles of communications and computer systems. Economics, driven by technology, is forcing a realignment, that stresses sharing, in the roles of the individual participants in the telecommunications system. Carriers, most notably, are no longer capable of invoking the sovereign prerogatives that once dictated their relationships with competitors with users and with governments. Governments in Canada must also accept that what they once believed were their sovereign powers exist no longer. At best they can be partners, sharing decision-making powers with other governments, with carriers, and with individual users who want to make their own choices.

Both levels of government have legitimate interests. They both want an economic and efficient telecommunications system, notwithstanding the different priorities and emphases they might seek to pursue. They also have vital stakes in the employment of the telecommunications system to attain a vast range of public objectives. To satisfy their interests and objectives, they must acknowledge that just as the telecommunications system is nationally integrated, they too are bound in a complex interdependent system. Interdependence results in a degree of dependence for all participants. The only satisfactory method of responding to that dependence is to agree to share appropriate responsibilities and powers.

The Clyne Committee recognized the dilemma when it stated that "there can be no possibility of establishing a rational structure for telecommunications carriage in Canada until the federal and provincial orders of government understand the necessity for it in national terms and agree to work together to achieve Canadian as well as regional or provincial objectives. . . ."[144] The governments have not yet responded to this challenge. Their failure to do so is in stark contrast to that of the founding members of the TransCanada Telephone System. Fifty years ago, in an act that Lederman aptly described as "private sector cooperative federalism," the members of the telephone

industry recognized their need for one another if Canada was to have a telecommunications system that would "achieve Canadian as well regional or provincial objectives." Governments have a responsibility to display a comparable capacity for creative co-operation. A failure to do so can only result in other centres of power, most of them not subject to Canadian control, assuming the initiative. To date the regulatory system has been the only major victim of the dynamic change in telecommunications. If Canadian governments do not imaginatively respond to the challenge, it is our telecommunications system that may become a casualty.

Notes

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[1] S. Nora and A. Minc, *The Computerization of Society* (Cambridge, Mass.: MIT Press, 1980) at 29.

[2] See B. Lesser, "The Implications of the Federal and Provincial Proposals for Regulating Telecommunications: An Economist's Perspective," and R.J. Buchan and C.C. Johnston, "Telecommunications Regulation and the Constitution: A Lawyer's Perspective," both in *Telecommunications Regulation and the Constitution* (Montreal: The Institute for Research on Public Policy, 1982).

[3] For an expression of this point of view, see B. Hodgins, *Where the Economy and the Constitution Meet in Canada*, Observation No. 24 (Montreal: C.D. Howe Institute, 1981).

[4] For two useful surveys of the development of the telecommunications "issue," see M. Fletcher and F.J. Fletcher, "Communications and Confederation: Jurisdiction and Beyond," in R.B. Byers and R.W. Redford, eds., *Canada Challenged: The Viability of Confederation* (Toronto: Canadian Institute of International Affairs, 1979), and R.B. Woodrow *et al.*, *Conflict over Communications Policy* (Montreal: C.D. Howe Institute, 1980).

[5] S. Serafini and M. Andrieu, *The Information Revolution and Its Implications for Canada* (Ottawa: Minister of Supply and Services Canada, 1981) at 11.

[6] In addition to the studies cited in Serafini and Andrieu, see A.G. Oettinger *et al.*, *High and Low Politics: Information Resources for the 80s* (Cambridge, Mass.: Ballinger, 1977); C.D. McGillem and W.P. McLauchlan, *Hermes Bound: The Politics and Technology of Telecommunications* (West Lafayette: Purdue University Press, 1978); Nora and Minc, *supra*, note 1; and G.O. Robinson, ed., *Communications for Tomorrow: Policy Perspectives for the 1980s* (New York: Praeger, 1978).

[7] The last neologism is from Oettinger *et al.*, *supra*, note 6.

[8] W.S. Baer, "Telecommunications Technology in the 1980s," in Robinson, *supra*, note 6 at 63–64.

[9] M. U. Porat, "Communication Policy in an Information Society," in Robinson, *supra*, note 6 at 12. The distinction is familiar to students of Canadian transportation as it was central to the McPherson Royal Commission on Transportation, *Report*, Vol. 1 (Ottawa: Queen's Printer, 1961). K.W. Studnicki-Gizbert has provided a more elaborate discussion in terms of endogenous and exogenous objectives. See his "Regulatory Policy Options in Transport," (1971), 12 *Transportation Research Forum Proceedings*.

[10] L. Johnson describes these as principles in "Boundaries to Monopoly and Regulation in Modern Telecommunications," in Robinson, *supra*, note 6 at 127–29. See also J.R. Meyer *et al.*, *The Economics of Competition in the Telecommunications Industry* (Cambridge, Mass.: Oelgeschlager, Gunn and Hain, 1980), and E. English, ed., *Telecommunications for Canada* (Toronto: Methuen, 1973).

[11] For a study that argues for revising pricing policies, see M. Fuss and L. Waverman, *The Regulation of Telecommunications in Canada*, Regulation Reference Technical Report No. 7 (Ottawa: Economic Council of Canada, 1981).

[12] Johnson, *supra*, note 10 at 134.

[13] See, for example, H.G. Aitken, "Defensive Expansion: The State and Economic Growth in Canada," in W.T. Easterbrook and M.H. Watkins, eds., *Approaches to Canadian Economic History* (Toronto: McClelland and Stewart, 1967), and H. Hardin, *A Nation Unaware: The Canadian Economic Culture* (Vancouver: J.J. Douglas, 1974).

[14] Among the many studies, see Department of Communications, Canadian Computer/Communications Task Force, *Branching Out* (Ottawa: Information Canada, 1972); Science Council of Canada, *Towards a National Science Policy for Canada*, Report No. 4 (Ottawa: Queen's Printer, 1968); *ibid.*, *Communications and Computers: Information and Canadian Society, A Position Paper* (Ottawa: Minister of Supply and Services Canada, 1978); and J.M. McLean, *The Impact of the Microelectronics Industry on the Structure of the Canadian Economy*, Occasional Paper No. 8 (Montreal: The Institute for Research on Public Policy, 1979).

[15] Serafini and Andrieu, *supra*, note 5 at 68 (emphasis in original).

[16] Department of Communications, Consultative Committee on the Implications of Telecommunications for Canadian Sovereignty, *Telecommunications and Canada* (Ottawa: Minister of Supply and Services Canada, 1979) at 64.

[17] R.B. Stewart, "The Reformation of American Administrative Law," (1975), 88 *Harvard Law Review* at 1813.

[18] For useful surveys of these and other intergovernmental disputes, see R. Simeon, "Intergovernmental Relations and the Challenges to Canadian Federalism," Discussion Paper No. 7 (Kingston: Queen's University, Institute of Intergovernmental Relations, December 1979), and D. Brown, "Intergovernmental Relations in Canada: The Year in Review 1979," (Kingston: Queen's University, Institute of Intergovernmental Relations, 1980).

[19] D.V. Smiley, *Canada in Question: Federalism in the Eighties*, 3d ed. (Toronto: McGraw-Hill Ryerson, 1980) at 205–8. This book provides the most authoritative overview of the developments in our federal system in the past four decades.

[20] The term 'intrusion' joined the argot of Canadian intergovernmental relations with the publication of the first "Report of the Western Premiers' Task Force on Constitutional Trends" (n.d.,n.p.) in May 1977. In April 1978 and March 1979, the second and third such reports were issued by K. Rafe Mair, Minister of Consumer and Corporate Affairs, Province of British Columbia, Chairman, Western Premiers' Task Force on Constitutional Trends.

[21] G. Julien and M. Proulx, "Le chevauchement des programmes fédéraux et québécois," quoted in J. Maxwell and C. Pestieau, *Economic Realities of Contemporary Confederation* (Montreal: C.D. Howe Institute, 1980) at 31.

[22] R. Dehem, *On the Meaning of "Economic Association"* (Montreal: C.D. Howe Institute, 1978) at 17.

[23] J. Evanson and R. Simeon, "The Roots of Discontent," in Institute of Intergovernmental Relations and Economic Council of Canada, *Proceedings of the Workshop on the Political Economy of Confederation* (Ottawa: 1979).

[24] For one study of "province building," see J. Richards and L. Pratt, *Prairie Capitalism: Power and Influence in the New West* (Toronto: McClelland and Stewart, 1979).

[25] For evidence of this growth as measured by government spending, see R. Bird, *The Growth of Government Spending in Canada*, Canadian Tax Papers No. 51 (Toronto: Canadian Tax Foundation, 1970). In terms of the growth of regulation at both levels of government, see M. Priest and A. Wohl, "The Growth of Federal and Provincial Regulation of Economic Activity, 1867–1978," in W.T. Stanbury, ed., *Government Regulation: Scope, Growth, Process* (Montreal: The Institute for Research on Public Policy, 1980).

[26] Léon Dion, *Quebec: The Unfinished Revolution* (Montreal: McGill-Queen's University Press, 1976) at 86.

[27] A.C. Cairns, "Research on the Institutions of Canadian Federalism," (unpublished paper prepared for Workshop on Relations among the Canadian Communities, Queen's University, November 1979) at 14.

[28] A.C. Cairns, "The Governments and Societies of Canadian Federalism," (1977), 10 *Canadian Journal of Political Science* at 708.

[29] Cairns, *supra*, note 27 at 15.

[30] A.E. Safarian, *Canadian Federalism and Economic Integration* (Ottawa: Information Canada, 1974); A.E. Safarian, *Ten Markets or One?* (Toronto: Ontario Economic Council, 1980); M.J. Trebilcock *et al.*, "Restrictions on the Interprovincial Mobility of Resources: Goods, Capital and Labour," in Ontario Economic Council, *Intergovernmental Relations* (Toronto: 1977); J. Maxwell and C. Pestieau, *Economic Realities of Contemporary Federalism* (Montreal: C.D. Howe Institute, 1980).

[31] Safarian, *Ten Markets or One*, *supra*, note 30 at 9.

[32] For an example see R.J. Schultz, *Federalism, Bureaucracy and Public Policy* (Montreal: McGill-Queen's University Press, 1980).

[33] See D.V. Smiley, *Conditional Grants and Canadian Federalism*, Canadian Tax Paper No. 32 (Toronto: Canadian Tax Foundation, 1963); *ibid.*, *Constitutional Adaptation and Canadian Federalism Since 1945*, Document No. 4 of the Royal Commission on Bilingualism and Biculturalism (Ottawa: Information Canada, 1970); A Careless, *Initiative and Response* (Montreal: McGill-Queen's University Press, 1977).

[34] See a report on the study that was not officially released by J. Simpson, "Bungling Hurt Ottawa in Quebec, Study Says," *Globe and Mail* (7 November 1979).

[35] See Task Force on Canadian Unity, *A Future Together* (Ottawa: Minister of Supply and Services Canada, 1979) and the other sources cited in A.C. Cairns, "Recent Federalist Constitutional Proposals: A Review Essay," (1979), 5 *Canadian Public Policy* 348.

[36] R. Simeon, "Regionalism and Canadian Political Institutions," in R. Schultz *et al.*, *The Canadian Political Process*, 3d ed. (Toronto: Holt, Rinehart and Winston, 1979) and A. Cairns, "From Interstate to Intrastate Federalism in Canada," Discussion Paper No. 5 (Kingston: Queen's University, Institute of Intergovernmental Relations, 1979).

[37] On the problem of unilateralism, see A.C. Cairns, "Constitution Making, Government Self-Interest and the Problem of Legitimacy in Canada," in A. Kronberg and H. Clarke, eds., *Political Support in Canada: The Crisis Years* (forthcoming).

[38] R.J. Schultz, *Federalism and the Regulatory Process* (Montreal: The Institute for Research on Public Policy, 1979).

[39] Department of Communications, *Instant World: A Report on Telecommunications in Canada* (Ottawa: Information Canada, 1971) at 211.

[40] Minister of Communications, *Proposals for a Communications Policy for Canada* (Ottawa: Information Canada, 1973) (hereafter *Green Paper*), and Minister of Communications, *Computer/Communications Policy: A Position Statement by the Government of Canada* (Ottawa: Information Canada, 1973).

[41] *Green Paper*, *supra*, note 40 at 7.

[42] The provincial position was presented by the Hon. John R. Rhodes, Ontario Minister of Transportation and Communications, at the Federal-Provincial Conference on Communications, 13–14 May 1975, Doc. No. COM–49.

[43] Minister of Communications, *Communications: Some Federal Proposals* (Ottawa: Information Canada, 1975 at 13 (hereafter *Grey Paper*).

[44] *Ibid.*

[45] Hon. Gérard Pelletier, Federal Minister of Communications, "Statement," Second Federal-Provincial Conference of Ministers Responsible for Communications, Ottawa, 15–16 July 1975 at 6.

[46] *Grey Paper*, *supra*, note 43 at 14.

[47] Hon. Gérard Pelletier, "Statement," *supra*, note 45 at 3 and 5.

[48] For information on the growth of cable television, see R.E. Babe, *Canadian Television Broadcasting Structure, Performance and Regulation*, study prepared for the Economic Council of Canada (Ottawa: Minister of Supply and Services Canada, 1979), and Canadian Radio-television and Telecommunications Commission, "CRTC Facts Digest," (December 1980) and "Pay-TV Digest," (September 1980).

[49] The details of the Canada-Manitoba Agreement, are found in the Public Announcement issued by the Hon. Jeanne Sauvé, Minister of Communications, Ottawa, 10 November 1976. See also R. Schultz, "Recent Developments in Federal-Provincial Liaison," in P. Grant, ed., *New Developments in Canadian Communications Law and Policy* (Toronto: Law Society of Upper Canada, 1980).

[50] On these negotiations, see R. Schultz, "Delegation and Cable Distribution Systems: A Negative Assessment," Discussion Paper No. 11 (Kingston: Queen's University, Institute of Intergovernmental Relations).

[51] See Schultz, *supra*, note 38 at 66–67.

[52] Canadian Radio and Television Commission, "Position Paper on Pay Television," Ottawa, February 1975.

[53] Maxwell and Pestieau, *supra*, note 21 at 32.

[54] See CRTC Public Notice, 30 December 1976 and Public Announcement, "Cable Television Service to Certain Areas of Manitoba," 8 August 1977 and Western Premiers' Task Force on Constitutional Trends, *Second Report* (April 1978) at 22.

[55] *Globe and Mail* (19 April 1976).

[56] See, for example, Department of Communications, "News Release: New Communications Legislation Introduced," 22 March 1977 and Hon. Jeanne Sauvé, "Notes for a Speech to the Canadian Association of Broadcasters," Winnipeg, 18 April 1977. The first version of the proposed legislation, Bill C–43, was given first reading in March 1977. The second, and basically identical, version, Bill C–24 was given first reading in January 1978, and the third version, C–16, again almost identical to the preceding two, was given first reading in November 1978.

[57] Canadian Radio-television and Telecommunications Commission, Telecom. Decision CRTC 79–11, 17 May 1979, *CNCP Telecommunications, Interconnection with Bell Canada*.

[58] *Ibid.* Telecom. Decision CRTC 77–11, 7 October 1977, *Challenge Communications Ltd. v. Bell Canada*.

[59] *Ibid.* Public Announcement 6 June 1978.

[60] *Ibid.* Telecom. Public Notice 1978-18.

[61] For a summary of the appeal and its disposition, see Canadian Law Information Council, 2 *C.R.R.* 1-120 and 3-47 respectively.

[62] CRTC, Telecom. Decision CRTC 81-13, 7 July 1981.

[63] Federal-Provincial Conference of Communications Ministers, "Report of the Federal-Provincial Working Group on Competition/Industry Structure in the Telecommunications Industry," Toronto, 16-17 October 1979, Doc. No. 830-54/003 at 1.

[64] Province of British Columbia, "Working Group: Statement of Position," Federal-Provincial Conference of Communications Ministers, Toronto, 16-17 October 1979, Doc. No. 830-54/031 at 1.

[65] Federal-Provincial Conference of Communications Ministers, "Joint Communiqué," Toronto, 16-17 October 1979, Doc. No. 830-54/036.

[66] *Ibid.* Doc. 830-54/041.

[67] The relevant decisions are Telecom. Decision CRTC 79-11, 17 May 1976; Telecom. Decision CRTC 77-11, 7 October 1977; Telecom. Decision CRTC 79-12, 7 June 1979; Telecom. Decision CRTC 80-13, 5 August 1980; and Telecom. Decision CRTC 81-13, 7 July 1981.

[68] For one statement of a consumer perspective on some of the issues, see H. Janisch, "Telecommunications Regulation and Competition: A Consumer Perspective," Working Paper No. 80-16 (Montreal: McGill University, Centre for the Study of Regulated Industries).

[69] *Green Paper*, *supra*, note 40 at 3.

[70] Minister of Communications, *Computer/Communications Policy*, *supra*, note 40 at 3.

[71] The last version was C-16, introduced in the House of Commons on 9 November 1978.

[72] Section 3 (e) of the proposed Telecommunications Act reads as follows: "broadcasting undertakings in Canada make use of radio frequencies and such undertakings constitute a single system, herein referred to as the Canadian broadcasting system, comprising public and private elements, which should be effectively owned and controlled by Canadians."

[73] *Green Paper*, *supra*, note 40 at 7.

[74] *Grey Paper*, *supra*, note 43. The quotations are from pages 3, 4 and 7 respectively.

[75] *Green Paper*, *supra*, note 40 at 14-17; *Grey Paper*, *supra*, note 43 at 12.

[76] Federal-Provincial Conference of First Ministers on the Constitution, Ottawa, 8-12 September 1980, *Verbatim Transcript*, Vol. I at 151.

[77] *Ibid.* at 152.

[78] *Ibid.* at 154.

[79] *Ibid.* at 155.

[80] The reader is reminded that where a public statement is not cited, information on provincial positions is based on interviews with officials in seven of the ten provincial governments. The interviews were conducted between April and June 1981.

[81] Government of Nova Scotia, "Memorandum of Evidence, Re: Bell Canada and B.C. Telephone Company Increases and Decreases in Rates for Services and Facilities Furnished on a Canada-Wide Basis and Related Matters," 10 March 1980 at 13.

[82] See, for example, Hon. Don Cody, "The Saskatchewan Perspective in Communications," Discussion paper prepared for Delta Dialogue Series Seminar #17, Montreal, 11 December 1980, and Saskatchewan, "Press Release," Interprovincial Conference of Ministers of Communications, Quebec City, 11-12 February 1981. Doc. 860-89/012. See also the testimony by Hon. J. Fraser Mooney, Minister of Highways and

Communications, Government of Nova Scotia, in the CNCP interconnection application, *Verbatim Transcript*, Vol. XXIII, 25 April 1978 at 4022.

[83] For discussion of the cable hardware ownership policy, see the sources cited in note 49 and H.N. Janisch, "Policy Making in Regulation: Towards a New Definition of the Status of Independent Regulatory Agencies in Canada," (1979), 17 *Osgoode Hall Law Journal* at 67–68.

[84] *Telecommunications and Canada*, *supra*, note 16 at 28.

[85] *Green Paper*, *supra*, note 40 at 30.

[86] Hon. Don Cody, Minister of Telephones, Government of Saskatchewan, "Saskatchewan Prepares for the Future," *Canadian Datasystems* (May 1981) at 105.

[87] Dr. Neil Webber, Associate Minister of Telephones, Government of Alberta, "Alberta Aims for Leading Role in Computer Communications," *Canadian Datasystems* (April 1981) at 95.

[88] Federal-Provincial Conference of First Ministers on the Constitution, Ottawa, 8–12 September 1980, *Verbatim Transcript*, Vol. I at 158–208.

[89] See notes 35, 37, and 62 above.

[90] See British Columbia, "Working Group: Statement of Position," Federal-Provincial Conference of Communications Ministers, Toronto, 16–17 October 1979, Doc. 830–54/031, and also "Position Statements," Federal-Provincial Conference of Communications Ministers, Charlottetown, 29–30 March 1978, Doc. 830–39/014.

[91] Federal-Provincial Conference of First Ministers on the Constitution, Ottawa, 8–12 September 1980, *Verbatim Transcript*, Vol. I at 156.

[92] Province of Ontario, "Bill C-24, The Telecommunications Act: Statement by the Hon. James Snow," Federal-Provincial Conference of Communications Ministers, Charlottetown, 29–30 March 1978, Doc. 830–79/021 at 4. See also "Government of Ontario Position Paper on Federal Telecommunications Legislation," September 1979 at 25–29.

[93] Hon. James Snow, Ontario Minister of Transportation and Communications, "Bell Canada, B.C. Tel, Telesat Canada, Increses and Decreases in Rates for Service and Facilities Furnished on a Canada-Wide Basis and Related Matters," 6 June 1980 (hereafter "TCTS Case").

[94] *Ibid.* Statement to Conference of Provincial Ministers of Communications, Vancouver, 27 November 1980.

[95] Government of Ontario, "Final Argument," "TCTS Case," at 7.

[96] Hon. James Snow, "Telecommunications Policies for a New Decade," Remarks to Annual Convention of the Ontario Telephone Association, 9 April 1980 at 15–16.

[97] *Ibid.* "Statement Regarding Industrial Strategy in the Communications Sector," Federal-Provincial Conference of Communications Ministers, Toronto, 16–17 October 1979, Doc. 830–54/013 at 1.

[98] "An Industrial Strategy for Telecommunications: Draft Recommendations Canada-Ontario," Federal-Provincial Conference of Communications Ministers, 16–17 October 1979, Doc. 830–54/018.

[99] Government of Quebec, *Toward a Quebec Communications Policy* (Quebec City, 1971), *ibid.*, *Quebec: Master Craftsman of Its Own Communications Policy* (Quebec City, 1973).

[100] Government of Quebec, Minister of Intergovernmental Affairs, *The Constitutional Discussions 1980: Selected Documents* (n.d.) at 79–87.

[101] Federal-Provincial Conference of First Ministers on the Constitution, Ottawa, 8–12 September 1980, *Verbatim Transcript*, Vol. I at 162.

[102] Argument of the Government of Quebec "Application by CNCP Telecommunications Regarding Access to Bell Canada's Network for Telecommunications Traffic," 18 May 1978 at 20 and 18 respectively.

[103] See, for example, Government of Quebec, Minister of Communications, "Competition," Statement for Federal-Provincial Conference of Communications Ministers, Charlottetown, 29–30 March 1978, Doc. 830–39/033 at 3 and *ibid.*, "Competition and the Industrial Structure," Statement for Federal-Provincial Conference of Communications Ministers, Toronto, 16–17 October 1979, Doc. 830–54/022 at 1.

[104] *Ibid.* "Competition," at 4.

[105] *Ibid.* at 3, and Jean Lucien Caron, "Telecommunications Regulation and Competition: A Quebec Perspective," Notes prepared for Seminar at McGill University, Centre for the Study of Regulated Industries, 2 February 1981 at 4.

[106] See Canadian Radio-television and Telecommunications Commission, Telecom. Decision CRTC 81–13, 7 July 1981 at 122.

[107] See, for example, the statement by the presidents of the four Atlantic telephone companies prepared for the 1973 Federal-Provincial Conference entitled "Comments on Communications Policy Proposals," 29 November 1973.

[108] Alberta Public Utilities Board, *Telecommunications Inquiry Report No. E80111*, 1 September 1980. For the Nova Scotia decision that authorized the interconnection of a radio paging network to Maritime Telegraph and Telephone's system, see Canadain Law Information Council, 2 *C.R.R.*, 2–150.

[109] Canadian Law Information Council, 2 *C.R.R.*, 3–43.

[110] For the two applications, see Canadian Radio-television and Telecommunications Commission, Telecom. Public Notice 1979–35, 30 November 1979, and "In the Matter of an Application by Alberta Government Telephones to the Public Utilities Board for an Order approving the Transfer of Terminal Equipment (Voice) Services from Regulated Intra-Provincial Basic Services to Unregulated Intra-Provincial Non-Basic Services," 16 February 1981.

[111] See note 106.

[112] *Ibid.* at 70.

[113] Bell Canada in a letter dated 4 September 1981 informed the CRTC that renegotiation of the revenue settlement plan to satisfy the CRTC's orders would result in a total gain to Bell of $13.0 million as opposed to $52.3 million as calculated by the Commission staff.

[114] See, for example, "Telecommunications Regulation and Competition: Three Industry Perspectives," Working Paper 1981–19 (Montreal: McGill University, Centre for the Study of Regulated Industries).

[115] F. Degenstein, in "Telecommunications Regulation and Competition: Three Industry Perspectives," *supra*, note 114 at 2.

[116] CNCP Telecommunications, "Brief on the Telecommunications Bill," November 1979 at 5.

[117] *Ibid.* at 6.

[118] *Ibid.* at 11.

[119] CNCP Telecommunications, "Submission of CNCP to the Consultative Committee on the Implications of Telecommunications for Canadian Sovereignty," December 1978 at 11.

[120] D.N. Hatfield, "Technological Transformation of Telecommunications and the Public Policy Response," (Williamsburg, Virginia: Institute of Public Utilities Conference, 3 December 1980) at 8.

[121] Canadian Radio-television and Telecommunications Commission, Telecom. Decision CRTC 79-266, 26 March 1979.

[122] Canadian Cable Television Association, "Submission on Delegation of Regulatory Authority over Cable Television," 11 March 1980 at 14.

[123] The Canada Consulting Group Inc., "World-Scale Competitive Positioning in Canada's Cable Industry," 20 February 1980 at I-7.

[124] Ontario Cable Telecommunications Association, "Towards Delegation: The Transfer of Jurisdiction over Cable Television to the Provinces," January 1980 at 18.

[125] Canadian Radio-television and Telecommunications Commission, Telecom. Decision CRTC 77-6, 27 May 1977 at 16.

[126] Canadian Cable Television Association, *supra*, note 122 at 11.

[127] The Canada Consulting Group Inc., *supra*, note 123 at II-11 (emphasis added).

[128] This is quoted in Peat Marwick and Partners, "A Review of Revenue Settlement Practices and Procedures Employed by Members of the Trans-Canada Telephone System: Phase Three Report," January 1980 at III-3.

[129] During the 1980 round of constitutional negotiations, the federal government sought to emphasize the free flow of goods and services within the Canadian common market as a priority item. See "Powers over the Economy," Meeting of the Continuing Committee of Ministers on the Constitution, 8-11 July 1980, Doc. 830-81/006 and the related discussion paper, Doc. 830-81/036.

[130] The phrase is Tom Courchene's from his excellent Innis Memorial Lecture, "Towards a Protected Society: The Politicization of Economic Life," (1980), 13 *Canadian Journal of Economics* at 558.

[131] For a discussion, see M.H. Sproule-Jones, *Public Choice and Federalism in Australia and Canada*, Research Momograph No. 11 (Canberra: The Australian National University, Centre for Research on Federal-Provincial Relations, 1975) at 55-59.

[132] The amended proposal is found in Document 830-81/008 and is reproduced in Appendix C of this volume.

[133] For a report on the most recent versions of proposed amendments see Congress and Quarterly Inc., *Weekly Report*, 12 July 1980 at 1943-46.

[134] See note 34 above.

[135] J.L. Sundquist, "The Crisis of Competence in Government," in J.A. Pechman, ed., *Setting National Priorities: Agenda for the 1980s* (Washington, D.C.: The Brookings Institution, 1980) at 549.

[136] See R.J. Buchan and C.C. Johnston, "Telecommunications Regulation and the Constitution: A Lawyer's Perspective," in *Telecommunications Regulation and the Constitution* (Montreal: The Institute for Research on Public Policy, 1982) at 160.

[137] J. Fournier, "Monopoly, Competition and Jurisdictional Issues: Policy Perspectives for the 1980's," speech to the 18th Annual Conference of the Canadian Industrial Communications Assembly, Toronto, 16 September 1980 at 12.

[138] See text, *infra*, at 83-84.

[139] CNCP Telecommunications, "Brief on the Telecommunications Bill," November 1979 at 12-14.

[140] See Appendix C of this volume.

[141] *Supra*, note 136.

[142] See, for example, the (Lambert) Royal Commission on Financial Management and Accountability, *Final Report* (Ottawa: Minister of Supply and Services Canada, 1979), Ch. 18; Economic Council of Canada, *Responsible Regulation: An Interim Report*

(Ottawa: Minister of Supply and Services Canada, November 1979), Ch. 5; Law Reform Commission of Canada, *Independent Administrative Agencies* (Ottawa: Minister of Supply and Services Canada, 1980), Ch. 4, and Canada, House of Commons, Special Committee on Regulatory Reform (Peterson Committee), *Report* (Ottawa: Minister of Supply and Services Canada, 1980), Ch. 5.

[113] See Appendix C of this volume.

[114] *Telecommunications and Canada*, *supra*, note 16 at 27 – 28.

Part III

Telecommunications Regulation and the Constitution: A Lawyer's Perspective

Robert J. Buchan
and
C. Christopher Johnston

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What we have witnessed over the years is the clash of two principles which have not been easy to reconcile; a need for a strong national communications system if Canada is to survive as an independent state with a distinct identity, and a need for the provinces to control their own social, cultural and economic development.

— Jean T. Fournier
Senior Assistant Deputy
Minister of Communications
Government of Canada

When Bell's rates go up it is nice to say that it is the Government of Canada who did it. In other words we haven't been seeking jurisdiction over Bell, we have enough problems.

— Hon. William Davis
Premier of Ontario

Introduction

Our task is to analyse, from a lawyer's perspective, the federal and provincial proposals for regulating telecommunications services and facilities in Canada that were tabled for consideration by First Ministers at the September 1980 Conference on the Constitution. The proposals were the product of protracted negotiations among specially designated ministers throughout the spring and summer months immediately preceding that historic conference. Those negotiations in turn reflected the work of successive federal and provincial ministers responsible for communications policy, and their respective officials, who had been meeting periodically since 1973 to consider the implications of various proposals relating to the sharing of regulatory jurisdiction over telecommunications in Canada.

The final negotiating proposals of both sides are formulated as alternative recommended amendments to sections 91 and 92 of the British North America Act, 1867.[1] They represent, therefore, an attempt to reduce to constitutional language what First Ministers perceived in 1980 to be the legitimate interests of their respective governments in an increasingly important and technologically complex field, one that barely existed when the Fathers of Confederation initially agreed upon an overall division of jurisdictional responsibility.

It is important to note at the outset that although broadcasting services, including those provided by cable television systems, are clearly comprised within the legally defined term of "telecommunication,"[2] we have been asked to focus only on the non-broadcasting

aspects of telecommunications, that is, on the implications of the proposals for ". . .the operations of the telephone companies and their present or potential competitors in the foreseeable future."[3]

The technologies and facilities employed by broadcasting and non-broadcasting telecommunications undertakings are constantly merging, particularly with the increased use of microwave and satellite facilities for long-haul signal transmission. Furthermore, the services provided by both are becoming increasingly difficult to categorize and distinguish, particularly in the area of videotex and teletext services currently being made available to participants in our much heralded "information society." However, given the terms of reference of this study, and the inherent complexity of the subject at issue, our remarks will perforce be limited primarily to our perception of the implications of the proposals for Canada's regulated telecommunications common carriers.

Before proceeding with this limited analysis of the proposals, it is necessary to make the following observation regarding broadcasting. Federal jurisdiction over broadcasting services provided by both over-the-air broadcasting and cable television undertakings has been consistently sustained in the highest courts from the 1932 Reference in *Re Regulation and Control of Radio Communications*[4] through to the 1977 *Capital Cities*[5] and *Dionne*[6] decisions. Owing to the fundamental and pervasive impact of broadcasting on the cultural values and well-being of all aspects of modern society, both of a local and national nature, provincial governments have been deeply dissatisfied with the limited role allotted to them by the courts since the earliest days of broadcasting in Canada. It is primarily for this reason that the communications dossier was placed on the "front burner" for consideration by First Ministers at the 1980 Constitutional Conference, and not because of the related non-broadcasting aspects of telecommunications. Until some extrajudicial negotiated formula is devised to balance the legitimate interests of the federal and provincial governments regarding jurisdiction over broadcasting, the telecommunications portfolio is destined to remain an area of acrimonious federal/provincial dispute.

By contrast with broadcasting, it is interesting to note that there is a relative dearth of leading constitutional decisions relating to the exercise of jurisdiction by either order of government over non-broadcasting telecommunications services and undertakings. This is so in spite of the confusing patchwork quilt of regulatory jurisdiction that is exercised with regard to such undertakings, which will be described later.

The pre-eminent case relating to jurisdiction over telephone facilities and services is *Toronto Corporation* v. *Bell Telephone Company of Canada*,[7] which was decided by the Judicial Committee of

the Privy Council in 1905. It held that Bell Canada's local and long-distance functions did not constitute separate and distinct undertakings for regulatory purposes and therefore confirmed federal jurisdiction over all aspects of Bell's telephone operations, which had been declared by Parliament to be "works for the general advantage of Canada" pursuant to section 92(10)(c) of the British North America Act.

That decision would appear, *prima facie*, to provide a strong point of departure for a claim by the federal government to exclusive federal jurisdiction over all interprovincial telephone and telegraph services, and over all of the interconnected systems and facilities used to provide such services. Such a claim has not to date been formally espoused. Regardless of the strength of the legal arguments that can be made for exclusive federal jurisdiction in this area,[8] it is in our view highly significant that this claim has never been asserted in the courts.

Although such arguments were raised squarely by interveners in a 1980 proceeding before the Canadian Radio-television and Telecommunications Commission (CRTC)[9] during a lengthy and wide-ranging investigation into the operations and organization of the TransCanada Telephone System (TCTS) and its revenue settlement procedures,[10] the commission made no finding on the broad jurisdictional issue. Further, when the provincially regulated Alberta Government Telephones appealed a commission order made in this proceeding requiring the production of financial information of the intra-company operations not only of the federally but also the provincially regulated members of TCTS, none of the parties to the appeal chose to argue the case on jurisdictional grounds.[11]

Neither the CRTC, the federally regulated telecommunications carriers, nor the provincially owned and regulated member companies of TCTS have been disposed to precipitate a judicial resolution of the constitutional legal issues relating to jurisdiction over those interconnected telecommunications undertakings that provide both intraprovincial and interprovincial telecommunications services using common interconnected facilities. Similarly, since 1905, no provincial authority has sought either to challenge the existing federal jurisdiction in this field or to have its own exercise of jurisdiction judicially confirmed, whether on a joint reference to the courts or otherwise.

This apparent aversion to constitutional litigation by both sides leads a Canadian lawyer to ask why, for more than seventy-five years, neither order of government has sought to obtain judicial clarification, as has been so readily done in such other areas of regulated enterprise as broadcasting, transportation, labour relations, fisheries, energy, and natural resources. We believe that one principal reason for not upsetting this particular constitutional applecart is that both sides

have grave and well-founded reservations as to the desirability of the jurisdictional and regulatory framework that might be imposed if such a court challenge were sustained. Reasoning by analogy from other fields having local and national aspects that cannot be separated by reference solely to the physical facilities employed, we believe a court forced to address this issue would hold either for,

a. exclusive federal jurisdiction over all telecommunications services and the facilities used to provide them (as has been held in the areas of broadcasting, aeronautics, rail transport, and nuclear energy)[12]

or, more likely,

b. a "two-tier" regime of divided jurisdiction (as has been done with regard to the regulation of fisheries, highway transport, and non-nuclear forms of energy).[13]

Although either of those two models might be more consistent with traditional principles of Canadian constitutional law than is the existing jurisdictional scheme, we doubt that either one would necessarily contribute to the development of a telecommunications industry as efficient and well regulated as that currently enjoyed by Canadians. Whatever the reasons, the fact that all major participants have been content for so many years to "let sleeping dogs lie" in a legal sense and to work within the existing framework of regulatory jurisdiction as it has evolved in Canada is, in our opinion, an important factor bearing on the need for change. We believe that were it not for the fact that non-broadcasting telecommunications services are generically and definitionally related to the highly contentious area of broadcasting, both levels of government (with Quebec possibly excepted from the provincial side) might have been able to agree in the last round of constitutional review not to disturb the existing jurisdictional framework with regard to such services. As our later analysis will show, we think that such a passive "solution" to this particular aspect of our constitutional dilemma would at least be preferable to enactment and implementation of either of the proposals for amendment to the Constitution that are under review.

However illogical and un-Cartesian the current division of federal and provincial responsibilities may appear to be, it is generally accepted that Canada's telecommunications system works remarkably well in comparison with other national telecommunications systems. The existing system of regulation provides for attainment of both federal and provincial objectives in the field of telecommunications, with a degree of active involvement by both levels of government. Notably, there has been little public demand for a broad-scale revision of regulatory jurisdiction. Canadians, by and large, appear to be quite

satisfied with the broad range and quality of non-broadcasting telecommunications services that are provided to them by the intriguing mixture of interconnected investor and government-owned telecommunications common carriers, whether they be regulated at the federal, provincial, or municipal level. The low level of public expression of discontent with our telecommunications system, as contrasted with the sustained high level of public criticism of Canada's postal system in recent years, is evidence of this rather general conclusion.

Furthermore, the existing pattern of regulatory jurisdiction has evolved with Canada's developing telecommunications industry and has achieved a certain historical sanctity. In the absence of strong public demand for a change to this system, we simply question whether change for change's sake is necessarily in the public interest. We think that the public interest might better be served by the development of consultative and co-operative mechanisms between the competent agencies of both orders of government working essentially within the existing jurisdictional framework, rather than by formal transfers of jurisdiction. While it would be preferable if such mechanisms were instituted by legislative action, constitutional change is not necessary or appropriate, in our view, to accomplish this purpose.

Current Operations of Canada's Telecommunications Carriers

It is essential to have some understanding of the nature of the non-broadcasting telecommunications facilities and services provided by Canada's telecommunications carriers before one can intelligently assess implications of proposals relating to the regulation of such undertakings. For our analysis it is at least necessary to examine whether telecommunications systems are basically "local works and undertakings" or are "other works and undertakings connecting the province with any other or others of the provinces or extending beyond the limits of the province" as those terms are used in section 92 of the British North America Act.

It is beyond dispute that the two specialized telecommunications carriers that provide long-haul interprovincial telecommunications services on a national basis, that is, CNCP Telecommunications (CNCP) and Telesat Canada (Telesat), cannot be classified as "local works and undertakings." the operations of Canada's major telephone companies, however, bear closer examination. Lederman, in his excellent study entitled "Telecommunications and the Federal Constitution of Canada,"[14] writes of the pervasive character of telephone networks as follows:

> They are based on paired wire connections from literally millions of individual homes, apartments, offices, and so on. These wires are first gathered together in larger wires or cables that run along or under local roadways or streets to link each subscriber with the local switching centre or exchange. Then the numerous local exchanges provide the primary elements of a hierarchical system of exchanges which progressively become fewer and cover wider territories as one proceeds from the lower to the higher levels of exchanges. . . . It is fair to say that these switched network facilities provided by the telephone companies are the heart of the telecommunications system in Canada.[15]

In Canada, no single telephone company has a capacity to provide a complete telephone service to Canadians in all regions using its own facilities. In effect, with the exception of Bell Canada, which provides service to most of Quebec, Ontario, and to the eastern part of the North West Territories, no single telephone company can provide service on its own facilities between points spanning more than one province.[16] The provision of such interprovincial services involves the use of facilities owned by one or more other telephone companies and, in some cases, the use of satellite facilities owned by Telesat.[17] This is all provided for in a web of connecting agreements that legally link together Canada's physically interconnected telecommunications undertakings. Such agreements usually provide for revenue settlements and for common technical standards to ensure compatibility of the systems that are being connected.

The systems of Canada's nine major telephone companies plus Telesat's satellite system are joined together pursuant to one such agreement.[18] It provides for telecommunications services between non-adjacent provinces, and is more complex than other connecting agreements in that it covers transmission by cable, microwave, and satellite, and provides for the establishment and operation of the TCTS organization run by a board of management. TCTS is responsible for the operation of this form of interprovincial telephone service and maintains a staff of over four hundred at its headquarters in Ottawa. Although TCTS is an unincorporated entity whose staff are loaned from the member companies, the Ontario High Court has recently found it to be a partnership under Ontario law.[19]

It is the responsibility of each member of TCTS to ensure that its system is connected with those of other telephone companies within its territory. Similarly, TCTS members enter into separate connecting agreements with adjacent TCTS members. In this way the disparate parts of Canada's telephone system are joined.

As noted, with the exception of calls between Quebec and Ontario, no interprovincial telephone communications can be provided without using equipment of more than one telephone company, regardless of

whether the transmission is carried by wire, cable, microwave, or satellite. All such communications must travel from an individual telephone set through local trunk-lines to a local exchange and then on to a long-distance exchange for interprovincial routing. The reverse route is followed at the receiving end. The same telephone sets, lines, and exchanges are utilized for the provision of intraprovincial and interprovincial services within a given province. Similarly, most telephone company employees are involved in the operation of both types of services.

It is relevant to note also that telephone companies use two distinct modes of telecommunication, one by wire and the other by radio communication. Radio communication makes use of a finite resource, the radio spectrum, which is separately regulated by the federal minister of communications under the Radio Act.[20] The combined use of radio and guided communications provides a flexibility and cost effectiveness that would not otherwise be available if communications were dependent entirely upon connection by paired wires. Thus, mobile telephones (provided by both the telephone companies and the radio common carriers), interacting with switched networks permit two-way communication without the necessity of a physical connection.[21] Microwave transmissions, using the upper regions of the radio frequency band, allow for communication over long distances that would be extremely costly by wire.

Cost effectiveness is also one great advantage of satellite transmission. The coverage of Telesat's Anik family of communication satellites, which provide broadcasting, telephone, and other forms of telecommunications services, extends virtually throughout the country. Distance is not a factor in the cost of satellite communications, since the cost of a circuit is the same whether the satellite transmission is between locations 200 or 2,000 miles apart.

In addition to basic telephone services, the telephone networks are being increasingly used in conjunction with computers to provide high speed, digitalized data telecommunications services. Used primarily by businesses, such services are offered on a national basis by the members of TCTS in competiton with CNCP. In addition, an increasingly wide range of teleprinter, telecopier, and private-line voice services are offered nationally on a competitive basis by TCTS and CNCP. Over the past decade, the rate of growth in such specialized long-distance services has accelerated significantly. This trend will doubtless continue with the dramatic development of home and office terminals allowing users to communicate with data storage banks situated in central locations across the country.

The Regulators of Canada's Telecommunications Carriers

The CRTC acquired regulatory jurisdiction over the federal telecommunications carriers from the Canadian Transport Commission following enactment of Phase I of the federal telecommunications legislation in 1976.[22] In addition to Bell Canada and B.C. Tel, the CRTC exercises jurisdiction over CNCP, Telesat, and two telephone systems operated by the Canadian National Railways. It also exercises plenary jurisdiction over cable television systems pursuant to the Broadcasting Act.[23] The federal minister of communications regulates the radio common carriers pursuant to the Radio Act.[24]

Most of the other telephone companies in Canada are regulated by provincial utility boards or commissions, with a few falling under the jurisdiction of local municipalities.[25] The largest municipally regulated system is Edmonton Telephones. Saskatchewan Telecommunications is somewhat unique in that it operates as an agency of the government of Saskatchewan under the management of a Cabinet-appointed board of directors, without surveillance by an independent body.[26] At one time, the small telephone companies across Canada numbered in the thousands, but over the past decade in particular, they have been quickly consolidated into the larger systems. In 1968, there were 2,067 undertakings offering public telephone service;[27] by 1978, that number had shrunk to 260.[28] The fourteen largest systems account for 99 per cent of the total plant and operating revenue of the country's telephone systems.

All of the regulatory boards apply essentially similar statutory tests in evaluating the rates of the carriers under their jurisdiction. Rates must be "fair and reasonable" and both rates and services must be offered on an equal basis to all potential subscribers without "undue" or "unjust discrimination." Such statutory provisions, however, offer the various regulatory boards wide discretion in the manner in which the statutory tests are applied and in the scope of regulatory overview. For example, some boards interpret their powers to include private-line and other so-called "non-basic" or specialized services, while others do not. Some exercise supervision that extends to such matters as terminal interconnection, system interconnection,[29] and rates for non-basic services, while others exercise a more restricted regulatory supervision.

This unevenness in regulation is particularly noticeable with respect to the services offered by TCTS, which was formed in 1931 when the seven major providers of the telephone services in Canada's nine provinces entered into a contractual arrangement to provide a Canadian coast-to-coast telecommunications system.[30] Up to that time it had been necessary to route many trans-Canada telephone calls through the United States because of the lack of suitable connecting

facilities in Canada. The original seven have since grown to ten and Quebec Telephones has been recently added as an associate member. The ten member companies of TCTS, their ownership, and regulation are as follows.[31]

COMPANY	OWNERSHIP	REGULATORY BODY
Alberta Government Telephones	Provincial Crown Corporation	Public Utilities Board of Alberta
B.C. Tel	Investor-Owned	CRTC
Bell Canada	Investor-Owned	CRTC
Island Tel, PEI	Investor-Owned	Public Utilities Commission of PEI
Manitoba Telephone System	Provincial Crown Corporation	Public Utilities Board of Manitoba
Maritime Tel & Tel	Investor-Owned	Board of Commissioners of Public Utilities of Nova Scotia
N.B. Tel	Investor-Owned	Board of Commissioners of Public Utilities of New Brunswick
Newfoundland Telephone	Investor-Owned	Board of Commissioners of Public Utilities of Newfoundland
Saskatchewan Telecommunications	Provincial Crown Corporation	Lieutenant Governor in Council
Telesat Canada	Government of Canada and the Regulated Canadian Carriers	CRTC

As noted above, TCTS as a composite entity is not separately regulated. When the members of TCTS decide on increases in long-distance interprovincial rates, each member company files the TCTS rate schedule with its respective regulatory authority either for approval or for information purposes only. Since the rates are uniform across Canada and set at levels as among the different long-distance services designed to satisfy the revenue needs of all members, regulatory bodies have tended to accept them without close examination. This has produced a kind of regulatory void in which the separate authorities have been reluctant to tamper with TCTS rates as filed because of the impact that would be felt in other jurisdictions if they were denied or substantially changed.

In 1978, the CRTC took an initiative to break this impasse after Bell Canada and B.C. Tel filed applications for changes in their TCTS rates.[32] The commission set broad terms of reference for the subsequent public hearing (referred to hereafter as the "TCTS rate hearing") and retained consultants to prepare a report on the Revenue

Settlement Plan under which the TCTS members divide the revenues and expenses associated with TCTS services. The provincially regulated members co-operated in this project by furnishing the financial information the consultants required.[33] However, positions hardened when the hearing began and the CRTC ordered that further financial data on all carriers be produced through Bell and B.C. Tel. In addition to the earlier mentioned appeal by Alberta Government Telephones to the Federal Court of Appeal, six of the provincially regulated members of TCTS and the Saskatchewan government petitioned the federal Cabinet to reverse the order. The CRTC's July 1981 decision on the rate applications ordered Bell and B.C. Tel to negotiate certain changes in the TCTS Connecting Agreement and Revenue Settlement Plan,[34] and the decision has given rise to a joint petition to the Cabinet[35] from all of the TCTS members on which a decision is pending. It is abundantly clear from this proceeding that establishing a regulatory structure acceptable to all of the members of TCTS and their respective regulators is the most fundamental problem to be addressed in any discussion of a rearrangement of jurisdiction.

Contributing further to the complexity of this issue is the fact that CNCP is regulated as an entity by the CRTC. In arguments made at the TCTS rate hearing, CNCP stressed that the existing system of regulation did not allow for even-handed competition in the provision of interprovincial telecommunications services. Divided authority over TCTS, it was asserted, puts CNCP at a serious disadvantage, particularly in any determination of whether TCTS monopoly services cross-subsidize the services it offers in competition with CNCP. Without full authority over all TCTS members, it is difficult for the CRTC to implement regulatory measures to prevent such cross-subsidization if it exists, or even to obtain sufficient information to allow an accurate assessment of this matter.[36]

An Historical Perspective

It may be useful at this point to describe briefly how this curious mixture of regulation and non-regulation of telecommunications carriers in Canada developed. Its roots are to be found in the law relating to telegraph systems, since telegraphy predated telephony by approximately thirty-five years.[37]

Although telegraph services in Canada were first introduced by independent companies, their main development occurred with the construction of the Canadian railways. By 1886, the privately owned Canadian Pacific Railway (CPR), empowered by its charter to conduct a commercial telegraph business, completed the first all-Canadian telegraph route from coast to coast. The formation of the publicly owned Canadian National Railways (CNR) between 1917 and 1921 led to the consolidation of the telegraph services of CNR's constituent

companies and laid the foundation of its telecommunications division (CNT). During the 1930s CNT and Canadian Pacific Telecommunications (CPT) co-operated in providing private-line and telegraph services, an arrangement that was formalized in 1947 by a working agreement between the two companies. (A more formal partnership agreement has just recently been ratified by the CRTC.)[38]

Although the Bell Telephone Company of Canada was incorporated by a Special Act of Parliament in 1880,[39] the first federal regulatory legislation as such was not enacted until 1906 when the Railway Act[40] was amended to provide for the regulation of telephone companies by a Board of Railway Commissioners. Prior to that time, government regulation was accomplished by amending Bell's charter. This first occurred in 1892 when Bell's Special Act was amended to prevent it from increasing its rates without the approval of the Governor in Council.[41] In 1902 Bell's charter was further amended to permit the Governor in Council to increase or decrease company rates upon the application of Bell or any interested municipality.

Following its incorporation in 1880, Bell began to purchase telegraph companies throughout Canada that were also providing telephone service. By this and other means, Bell established operations between 1880 and the turn of the century in most of the urban centres across Canada, except those in British Columbia. However, because Bell lacked the capital to extend such service to many of the rural areas of the country, numerous small independent companies sprang up to provide this service and to interconnect their systems to those of Bell.[42]

During this early period, Bell had hoped to raise the capital necessary for extension of services by bringing in new partners in the various regions of the country, while retaining part ownership and control of the new companies formed for this purpose. While this plan was successful in Atlantic Canada, where separate controlled subsidiaries were created in Prince Edward Island in 1885, in Nova Scotia in 1888, and in New Brunswick in 1889, it met considerable opposition in the West where political pressures were strongly applied to persuade Bell to sell its systems outright to the provincial governments. The seeds of the jurisdictional disputes over telecommunications services between the western provinces and Ottawa were planted in these early struggles for control of telephone operations.

A graphic example of this early expression of western alienation is provided by historical accounts of what transpired in the prairie provinces. Before Alberta became a province in 1905, Bell Canada had commenced operations in parts of that territory. However, in the first legislative assembly of the newly formed province, a government-sponsored bill was introduced to empower municipalities to operate telephone systems and the government announced its intention to

commence construction of its own telephone system.[43] By early 1907, the Alberta government-owned telephone system was operating in competition with Bell and substantially undercutting Bell's rates. Negotiations between Bell and the Alberta government continued throughout 1907, but by early 1908 Bell decided in the face of the strong political pressure to sell its entire operations in Alberta at a price of $675,000.[44]

A somewhat similar scenario unfolded in Saskatchewan during the same period. When that province entered Confederation in 1905, the provincial government was concerned that the communications needs of the prairie farmers were not being met. Bell's service in Manitoba was extended west from Winnipeg to Regina in 1906; however, in 1908 the Saskatchewan government created a Department of Railways, Telegraphs and Telephones, which in turn created the Saskatchewan Government Telephones Corporation. At the end of 1908, Bell agreed to sell all of its assets in Saskatchewan to the government for $358,000.[45]

In Manitoba, Bell had been providing service (originally through a franchised agent) since 1878. However, in 1899 the municipalities in that province were granted the power to operate their own telephone systems, and many did. By late 1907, in response to similar political pressures to those which had arisen in Saskatchewan and Alberta, the government informed Bell of its plans to create its own telephone system and to buy out Bell. Manitoba purchased all Bell's interests in the province in January 1908, for $3.3 million.[46]

In British Columbia, Bell had enfranchised an agent by 1878, fully two years before the company's incorporation. By 1880, however, delays in transporting telephones west of the Rockies prompted the agent's resignation, his ensuing incorporation of the province's first private telephone company, and Bell's last serious attempt to service British Columbia. A number of companies that sprang into operation were gradually merged, and, by virtue of an amalgamation in 1904, the British Columbia Telephone Company Limited came into existence. In 1916, the federal government incorporated the Western Canada Telephone Company to provide service in British Columbia and, three years later, this company changed its name to the British Columbia Telephone Company. In 1923, the confusion existing between the private company and the federally incorporated company was ended when the latter acquired the assets of the former.[47]

One may well speculate about the likely character of telephone regulation today had Bell been able to raise adequate capital to maintain and extend its early operations in the Atlantic and prairie provinces into an integrated national undertaking. As a federal company declared in its amended Special Act of incorporation to be a "work for the general advantage of Canada," exclusive federal

jurisdiction over Bell would then have extended to its operations in eight provinces and the territories. In that case, the major carriers in all of the provinces, including B.C. Tel, would have been federally regulated.

Provincial regulatory boards would no doubt have come into existence to regulate the smaller independent provincial companies, thereby rendering the regulatory division throughout Canada similar to that currently existing in Ontario and Quebec, where the Ontario Telephone Commission and the Quebec Public Service Board, respectively, regulate the smaller telephone companies in those provinces. Under this scenario, Bell by itself would have supplied a trans-Canada network of facilities and services, and fulfilled the function that the members of TCTS currently perform. Thus, the problems occasioned by divided jurisdiction over the members of TCTS would not have arisen, since the federal regulator would have had complete authority over both interprovincial and major intraprovincial services throughout Canada. In the absence of such a development, however, it was necessary to create provincial boards to regulate the major carriers in each of the provinces from which Bell withdrew.

The Constitutionality of Current Regulation

As noted above, neither order of government has chosen to date to seek a judicial resolution to the unsettled constitutional issues relating to the regulation of non-broadcasting telecommunications services in Canada. The federal government has not been disposed to seek exclusive federal jurisdiction over all the interconnected facilities that provide such services, both out of deference to provincial sensitivity and a lack of conviction that a monolithic unitary model of national regulation would necessarily be in the public interest. The various provincial governments have similarly avoided legal action presumably because, having contemplated the potential results, they are unwilling to risk a court challenge.

We do not consider it would be appropriate in this paper to provide a detailed analysis of the competing legal theses for federal and provincial regulation of telephony under the existing Constitution.[48] Nevertheless, it is important to understand the basic jurisdictional arguments in assessing the validity of the current proposals and the extent to which they deviate both from the probable legal entitlement of each side under the British North America Act (BNA Act) and from the actual division of regulatory authority as it is currently exercised.

Sections 91 and 92 of the BNA Act list the matters over which the federal and provincial governments respectively have exclusive jurisdiction. The proponents of federal jurisdiction over telecommunications tend to rely on the following powers to support their claim:

(1) The opening words of section 91 which permit Parliament to "make orders for the Peace, Order and good Government of Canada, except with respect to those matters exclusively reserved to the legislatures of the Provinces";

(2) Section 92(10)(a) which exempts from provincial jurisdiction "Lines of Steam or other Ships, Railways, Canals, *Telegraphs*, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province"; and

(3) Section 92(10)(c) which excludes from local works and undertakings otherwise subject to provincial authority "Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces." (emphasis added)

Matters expressly excepted from provincial jurisdiction are brought within the exclusive jurisdiction of the Parliament of Canada by virtue of section 91(29) of the BNA Act.

Those espousing the provincial case for a significant role in the regulation of telecommunications carriers cite the following three explicit references to provincial heads of power contained in section 92 of the BNA Act, namely:

(1) Section 92(10) which authorizes the provincial legislature to legislate in relation to "local Works and Undertakings other than such as are of the following classes. . ." (the relevant exceptions are noted above);

(2) Section 92(13) which authorizes provincial legislation in relation to "Property and Civil Rights in the Province"; and

(3) Section 92(16) which permits the provincial legislature to make laws relating to "generally all Matters of a merely local or private Nature in the Province."

Turning briefly to the preamble to section 91, the "peace, order, and good government" clause provides an arguable basis for exclusive federal jurisdiction in telecommunications. At one time the federal general power was interpreted as an emergency power only; however, *Johannesson* v. *West St. Paul*[49] and two other recent cases adopted the more expansive view of this power,[50] first expounded in *A.G. for Ont.* v. *Canada Temperance Federation:*

> . . . the true test must be found in the real subject matter of the legislation; if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the

concern of the Dominion as a whole . . . then it will fall within the competence of the Dominion of Parliament as a matter affecting the peace, order, and good government of Canada although it may in another respect touch upon matters especially reserved to the provincial legislature.[51]

While this "national dimensions" or *Canada Temperence* test might suggest that telecommunications, like aeronautics, is a matter falling within federal jurisdiction, that test may have been narrowed in scope by the decision of the Supreme Court of Canada in the *Anti-Inflation Reference*.[52] In that case, the federal emergency doctrine was resurrected and applied to uphold the federal Anti-Inflation Act.[53] Nevertheless, certain statements in the decision[54] seem to suggest that the federal general power would also validate legislation concerning new matters with a national dimension not falling within any of the enumerated heads of section 92 but having "a natural unity that is quite limited and specific in its extent."[55] It would be argued by proponents of federal jurisdiction that telecommunications comes within this category of "limited and specific" subject matters and therefore attracts paramount federal jurisdiction.

On the other hand, supporters of provincial regulation of telecommunications would counter that this matter falls within the list of pervasive sweeping categories such as language or pollution which, if recognized as a matter of national concern for the purposes of determining legislative competence, would serve to undermine provincial authority over matters of a local nature or involving the regulation of business activity within the province. Rather, it would be argued, telecommunications must be broken down into its constituent subject matters that fall within provincial jurisdiction.

Of the various heads of powers in the BNA Act that might govern telecommunications, section 92(1) is the most often discussed, with particular reference to subsection 92(10)(a). The reference to "telegraphs" in the subsection and the similarity of telegraph and telephone undertakings provide a persuasive argument for federal jurisdiction over interprovincial telephone services. Indeed, the Judicial Committee of the Privy Council stated in the case of *Toronto* v. *Bell Telephone Company*[56] that section 92(10)(a) applies equally to a telephone company whose objects of incorporation extend beyond the limits of one province, as it does to a telegraph company with like powers of extension.

The common thread running through arguments for provincial regulatory jurisdiction is the idea of physical facilities ("works") and enterprises ("undertakings") that are locally situated and whose operations and impact are primarily of a local nature. The arguments supporting provincial regulation focus, therefore, on the incidents of localness in the facilities and services provided by telecommunications

carriers. It is stressed that carriers currently subject to provincial regulation are provincially incorporated or chartered companies that were established to provide telephone service primarily within the boundaries of single municipalities or provinces. Their administrative operations are located within these boundaries. In the case of the prairie provinces, the major carriers are owned and operated by provincial governments. Most importantly, the extensive physical facilities of the provincially regulated carriers are located entirely within provincial boundaries.

All of these incidents are persuasive indicators that such carriers' operations are "local works and undertakings" over which provincial governments could be seen to have exclusive jurisdiction under the opening words of section 92(10). In this connection, it is important to distinguish between a "work," as a physical thing, and an "undertaking," which has been judicially described not as a physical thing, but as "an arrangement under which . . . physical things are used."[57]

To determine whether interconnection between telephone companies, situated in different provinces, makes them interprovincial undertakings within subsection 92(10)(a), assistance is usually drawn from jurisprudence dealing with other forms of interprovincial extensions of service. In *Luscar Collieries Ltd.* v. *McDonald*,[58] the Privy Council held that a privately owned railway branch line, located entirely within Alberta, but connecting to the CNR's interprovincial line and operated by the CNR, was a section 92(10)(a) undertaking. This result would obtain whether or not the private line itself extended to provincial boundaries; the contractual arrangements between the parties that permitted the free flow of traffic rendered the branch line an interconnecting undertaking.[59]

This approach was followed in the "*GO Transit*" case,[60] which upheld federal jurisdiction over a local commuter train service operating on track owned by CNR as part of its national system. The Supreme Court of Canada concluded that constitutional jurisdiction depended on the character of the railway line and not on the character of a particular service provided on that line.

Against these judgements, proponents of provincial jurisdiction tend to cite *City of Montreal* v. *Montreal Street Railway Company*.[61] In that case, the Privy Council denied federal jurisdiction over a Montreal tramway merely on the basis of a physical connection with a federally regulated railway and an agreement permitting through traffic from one system to the other. However, both undertakings were local to the Montreal area and, unlike the situations in the *Luscar Collieries* and *GO Transit* cases, were separated both as to operations and ownership of the physical facilities comprising each undertaking.[62]

While the railway cases in this area are difficult to reconcile, it would appear that something more than mere physical connection

between systems permitting an interprovincial flow of services is required to attract federal jurisdiction under section 92(10)(a). Some form of common or joint enterprise is needed that transcends the separate operations of the connecting carriers. Where one of the carriers is federal, the *Luscar Collieries* and *GO Transit* cases seem to require only an involvement by the federal carrier in the operation of the provincial carrier or in the ownership of its distribution facilities. There seems little doubt that the existence of TCTS as a joint enterprise provides the additional element necessary to make the connecting TCTS systems interprovincial "works and undertakings," at least in respect to TCTS services. We hold this view notwithstanding the fact that the physical facilities used in the provision of TCTS services are separately owned by the individual members.

If this is so, are the intraprovincial services offered by TCTS members severable from TCTS services for jurisdictional purposes? In the case of carriers that are under federal jurisdiction because they are "declared to be for the general advantage of Canada" under section 92(10)(c), the question appears to have been long settled by *Toronto* v. *Bell Telephone Company*. In that case, the court refused to consider Bell's local and long-distance operations as separate undertakings and held that federal jurisdiction extended to all aspects of Bell's operations.

With respect to provincially regulated carriers, an important case frequently cited on the issue of jurisdictional severability is *A.G. for Ont.* v. *Winner*,[63] which involved a bus company providing both intraprovincial and extraprovincial services. While the Judicial Committee of the Privy Council stated that it might accede to an argument for divided jurisdiction if there were evidence that Mr. Winner's company was engaged in two distinct enterprises, the facts did not indicate the requisite degree of separation in the company's operations. Further, two later trucking cases suggest that the size of the distribution of business between the local and interprovincial operations have little bearing on the issue.[64] Finally, it should be noted that incorporation of a subsidiary company to carry on the interprovincial aspects of the business will not preclude a finding that the enterprise constitutes a single integrated undertaking subject to federal jurisdiction.[65]

The exceptions to section 92(10) of the BNA Act clearly indicate that federal regulatory jurisdiction was intended to attach to transportation and communications facilities and systems that extend beyond the limits of a single province. The question remains whether that jurisdiction is absolute or whether the provincially regulated telecommunications carriers are organized in such a way that their local and interprovincial services can be viewed as separate enterprises for jurisdictional purposes. It would be argued by proponents of federal

jurisdiction that the local and long-distance services are so interwoven, both with respect to the physical facilities or "works" and the organizations or "undertakings" that provide them, that federal jurisdiction extends to all aspects of the carriers' operations.

The argument is strengthened by the extensive and integrated use of radiocommunication in the carriers' systems in the form of microwave and satellite transmissions. Radiocommunication is a subject exclusively within federal jurisdiction. Applying the reasoning of the *Radio Reference*[66] case, it may be similarly argued that telephone communication cannot function as a system without all of its components, including those that cross provincial boundaries. Once federal jurisdiction is conceded over the interprovincial elements, it can be argued that jurisdiction over local elements must follow.

On the other hand, local telecommunications carriers' facilities and services in the majority of provinces have been provincially regulated for more than sixty years. To uphold provincial jurisdiction in this area, the courts could use the opening provided in the *Winner* case to make a finding that the provincially regulated carriers operate separate undertakings for local and interprovincial purposes, and to impose a two-tier model of regulation, at least over those member companies of TCTS that are currently subject to provincial jurisdiction. The national carriers (CNCP and Telesat) and the radio common carriers would then remain subject to exclusive federal jurisdiction, as would Bell Canada and B.C. Tel, unless the declaration in their respective charters were revoked and Bell's undertakings were severed along provincial lines.

Federal and Provincial Proposals for Constitutional Amendment

Having reviewed the complex background of the institutional and jurisdictional framework under which non-broadcasting telecommunications facilities and services are currently regulated in Canada, we turn now to the federal and provincial proposals for a realignment of jurisdiction.

The federal proposal tabled at the Constitutional Conference in September 1980 is a slightly more sophisticated and complex version of a proposal first outlined, in non-statutory language, in the March 1973 policy document entitled *Proposals for a Communications Policy for Canada — A Position Paper of the Federal Government of Canada.*[67] That document (the "Green Paper") noted the existing division of legislative authority over telecommunications carriers and stated:

> Thus, since there has been no co-ordinated authority over the several undertakings that together provide telephone service to all parts of Canada, the recognition of a "national dimension" in the

network as a whole has been left largely to the discretion of the Trans-Canada Telephone System (TCTS). . . . TCTS is not incorporated and has not, as a composite undertaking, been subjected to any regulation whatsoever. Although a commendable degree of coordination and standardization has been achieved by TCTS since its formation in 1931, there has in the past been little opportunity for expression of public interest, in a national sense, in the orderly development of telephone systems in Canada.[68]

The Green Paper went on to propose two alternative approaches to this perceived problem of the non-regulation of the TCTS network as a composite undertaking, and to solicit the views of interested provincial governments on these alternative proposals.

The first alternative, which is similar to the federal proposal of 1980, suggested the introduction of a two-tier system of regulation in which the international and interprovincial aspects of all Canadian telecommunications carriers' undertakings would be subject to provincial authority. Implementation of such a regulatory system would have involved formal transfers of regulatory jurisdiction.

The Green Paper noted that such a two-tier regulatory model exists in the United States with the long-line services operated by the American Telephone Telegraph Company (AT&T) subject to the authority of the Federal Communications Commission (FCC), while the individual states have jurisdiction over the intrastate operations of the telephone companies. It then went on to comment in a rather pointed fashion:

> There is much evidence that experience in the United States is not very encouraging for the development of a dual system of regulation of telephone service.[69]

The second and favoured federal proposal at that time involved the establishment, presumably by federal and provincial legislation, of formal consultative arrangements to provide for effective collaboration between the two levels of government and their respective regulatory bodies. Such collaboration would have included the systematic disclosures and exchange of information on regulated undertakings.

There was a terse exchange of views on these federal proposals at the first conference of ministers of communications in November 1973. The provincial ministers reportedly considered the federal proposals to be a presumptuous attempt by federal authorities to intrude into areas of provincial jurisdiction. This unsuccessful conference was followed by a series of meetings between the federal minister and individual provincial ministers in April 1974.

In April 1975, the government published a subsequent policy paper entitled *Communications: Some Federal Proposals*[70] (the Grey Paper),

to provide a basis for further federal/provincial consultation. That paper rejected, for the time being at least, the alternative of a two-tier regulatory model that had been proposed (in a back-handed fashion) in the Green Paper. The Grey Paper stated that the federal government did not believe the problem of achieving a comprehensive regulatory overview of Canadian telecommunications could be achieved by formal transfers of legislative authority to or from provinces,

> . . . precisely because all modes of telecommunications have both local and extra-provincial aspects, and because these cannot be distinguished by reference to the physical facilities employed.[71]

The Grey Paper went on to advocate implementation of a series of non-legislative consultative mechanisms amongst federal and provincial ministers, including the establishment of a federal/provincial Committee on Communications Policy at the ministerial level, and an Association of Communications Regulatory Bodies. That paper also contained an outline of proposed two-phase comprehensive federal legislation relating to telecommunications within federal jurisdiction. It also specifically invited the provinces to propose "practicable arrangements" designed to give them a greater share in the licensing and regulation of cable television systems.

Publication of the Grey Paper was followed in May 1975 by a second conference of ministers of communications. The majority of discussion at that time was devoted to jurisdiction over broadcasting and cable services.[72]

Discussions among federal and provincial officials continued through the next eighteen months, with the major focus being on the issue of cable delegation and the proposed Phase II federal telecommunications legislation.

In November 1976, the federal government and Manitoba concluded an agreement on telecommunications jurisdiction that specifically reaffirmed federal authority over video programming services distributed by cable systems within that province, including pay television, but gave the government of Manitoba regulatory responsibility for non-programming services to be offered by cable systems in competition with other potential providers of such services.[73]

In the spring of 1977, federal and provincial ministers of communications met in Edmonton, and again in Charlottetown in the fall of 1978. During that period, relations among ministers were relatively amicable; the implications of the proposed Phase II federal telecommunications legislation[74] provided an ample basis for discussion — as did proposals for an enhanced provincial role in cable regulation, satellite planning, and the introduction of pay television services. The subject of transfers of jurisdiction over non-broadcasting telecommunications undertakings was carefully avoided.

In February 1979, at the Ottawa meeting of the First Ministers on the Constitution, the federal government tabled publicly for the first time a specific proposal for the sharing of jurisdiction over cable systems. This would have provided for concurrent jurisdiction over cable, with federal paramountcy over certain aspects and provincial paramountcy over others.[75]

That cable delegation proposal was considered in detail by federal and provincial ministers of communications at a meeting in Toronto in October 1979, as was the pressing issue of federal/provincial guide-lines on the proposed introduction of pay television and extension of telecommunications services via satellite. Those guide-lines served as a basis for the February 1980 public hearing on these subjects convoked by a committee of the CRTC (the Therrien Committee), which included designated provincial representatives.[76]

It should be noted that relations among federal and provincial communications ministers through the 1976–1980 period were much less strained than they had been during the 1973–1976 period. In part that might be explained by the changing personalities involved, but the principal reason for this enhanced co-operation appears to be that the federal government had given the strong impression (following conclusion of the Canada–Manitoba agreement) that it was prepared to cede at least some jurisdiction over cable in response to "practicable" provincial proposals that recognized the national interest in broadcasting. Also, the meetings during that latter period did not focus on proposals for formal transfers of jurisdiction over telecommunications carriers.

It was against this background that the federal and provincial proposals of 1980 were developed. The federal government appears to have decided that it would be prepared to cede jurisdiction at least over the non-programming services distributed via cable as well as over the intraprovincial services provided by the federally regulated telephone companies. However, the concern expressed in the 1973 Green Paper and the 1975 Grey Paper with the need to achieve a comprehensive national overview of the Canadian telecommunications system, and over the interprovincial services provided by TCTS in particular, remained a paramount federal consideration in the negotiations that took place during the spring and summer of 1980.

The 1980 federal proposal,[77] which advocates a revised two-tier regulatory model, attempts to address the problem of national overview of the whole system by means of the creation of a new national regulatory board that would have full-time federal and provincial representation. The board, comprised of five members appointed by provincial governments and six by the federal government, would have jurisdiction over all aspects of interprovincial rates and services provided by the provincial carriers, as well as over issues

relating to conditions of service, such as interconnection. We presume the new joint board would also assume the exclusive jurisdiction of the CRTC over "national and international telecommunications carriers" and "space and satellite telecommunications carriers."

If this federal proposal were implemented, Bell Canada's intraprovincial services in Ontario and Quebec would be regulated by provincial authorities in those provinces. The regulatory agencies of British Columbia and Newfoundland would acquire similar authority respectively over B.C. Tel and Terra Nova Tel (formerly Canadian National Telecommunications). As a *quid pro quo*, the provincial regulatory authorities in the Atlantic and prairie provinces would surrender jurisdiction (to the extent it has been exercised) over interprovincial rates and services to the new joint regulatory body.

The provincial proposal, as outlined in the "Best Efforts Draft,"[78] proposes exclusive provincial jurisdiction over all telecommunications works and undertakings located solely within provincial boundaries, and concurrent but paramount[79] provincial jurisdiction over those works and undertakings extending beyond provincial boundaries. The only exceptions reserved for exclusive federal authority would be matters relating to the technical management of the radio frequency spectrum, the space segment of communications satellites, national broadcasting networks, and the use of extraprovincial telecommunications works and undertakings for aeronautics, radio-navigation, defence, or in national emergencies.

In broadcasting, including cable, this provincial proposal would involve a massive shift in jurisdiction now exercised exclusively by the CRTC acting pursuant to the Broadcasting Act.[80] The proposed change in regulation of non-broadcasting telecommunications services would not be quite so dramatic, since it is already fragmented among federal, provincial, and municipal authorities. In non-broadcasting telecommunications, the provinces' proposal would involve transfers of jurisdiction over intraprovincial operations of Bell, B.C. Tel, Terra Nova Tel, and NorthwesTel in the same manner as proposed by the federal government, but would also allow provincial authorities to regulate interprovincial and international services and rates on a concurrent and paramount basis.

Analysis of the Proposals

The criteria selected to evaluate the implications of the proposals will vary with the perspectives of those performing such an evaluation. From the viewpoint of lawyers involved in telecommunications regulation, we believe those criteria should include the following:

1. Do the proposals adequately reflect the basic principle underlying sections 91 and 92 of the BNA Act, that is, do they balance the interests of both levels of government in a federal system?

2. Are the powers granted sufficiently complete in each case to allow each level of government to regulate fully in its own sphere?
3. Are the respective spheres of authority clearly enough delineated so as to avoid overlapping or conflicting regulation?
4. Are the proposals likely to lead to consistent, fair, and efficient regulation to the benefit of all interest groups?

There are obviously additional questions others may ask that may be of equal or greater importance, but a discussion of the proposals measured against these tests will serve to illustrate what we perceive to be their major strengths and weaknesses.

Reflection of Legitimate Interests of Both Levels of Government

Provincial Proposal

Perhaps the greatest single weakness of the provincial draft is that it fails to reflect adequately the national dimension in telecommunications. We believe there should be some authority responsible for and able to ensure that the various components of the integrated system are developed in harmony and in the broader national interest. This may take the form of establishing national standards for terminal or system interconnection, ensuring that comparable rates are charged for comparable interprovincial services, or requiring that the terms and conditions governing competition in the introduction of telecommunications services are roughly similar in all regions of the country. It would also mean that access to all systems is preserved to ensure the unimpeded flow of communication throughout the country.

In our view, implementation of the provincial consensus proposal could result in a balkanized telecommunications system in Canada. By giving the respective provincial legislatures exclusive jurisdiction over all telecommunication "works and undertakings wholly situate within a province," as well as paramount jurisdiction over most of the services provided within a province by the interprovincial telecommunications carriers, the provincial proposal would limit paramount federal jurisdiction to "matters of a technical nature respecting management of the radio frequency spectrum," "the space segment of communications satellites," and "the use of telecommunication works and undertakings for aeronautics, radio-navigation, defence, or in national emergencies."

Subject to those few specific limitations, the provinces would exercise jurisdiction over all of the works and undertakings of all carriers within provincial boundaries including radio common carriers and cable systems. The national regulatory authority would thereby be precluded from exercising effective regulatory oversight over the national telecommunications system. Further, unless the provinces entered into a joint regulatory arrangement, interprovincial services

would be largely unregulated because no provincial authority acting on its own could regulate services offered in other jurisdictions. The result could be a series of different rates and standards applicable to interprovincial services in the various provinces.

Federal Proposal

The federal proposal comes closer to the mark when assessed against our first criterion, but it would grant some rather broadly defined powers to the federal authorities, which could give rise to acrimonious disputes in the future. The federal proposal essentially represents an offer by the federal government to cede the jurisdiction it currently has over the intraprovincial operations of the federally regulated telephone and cable companies in exchange for a recognition by the provinces of a national dimension in the interprovincial aspects of telecommunications. Parliament's existing jurisdiction over the radio frequency spectrum, satellite carriers, and interprovincial terrestrial carriers would be confirmed by statute. There would also be recognition of the authority of Parliament to legislate with regard to "the technical aspects of telecommunications" and with regard to any carriage in a province "for a national purpose." Unfortunately, however, the broad language used in these phrases could result in an expansive interpretation of federal power that would undermine the legitimate interest of the provinces in the local dimensions of telecommunications. This important point will be discussed in more detail in the section relating to the delineation of the respective spheres of authority.

The federal proposal also contains a separate paragraph that would impose upon both orders of government a constitutional duty to consult on an annual basis "on the formulation, co-ordination and implementation of laws, policies, programmes and practices respecting communications." Experience in the fields of international law and labour relations with such mandatory consultative processes has admittedly yielded mixed results. However, inclusion of such a paragraph does reflect an appreciation by the federal government that some degree of flexibility must be maintained in the constitutional formula for the sharing of regulatory responsibility in the rapidly evolving field of telecommunications.

Completeness of Powers

Provincial Proposal

While the provincial proposal would provide each provincial legislature with broad powers to regulate all carriers providing telecommunications service within their respective boundaries, it has some serious gaps and inconsistencies. For example, there would be a void in

jurisdiction over connecting agreements involving provincial carriers whose systems are wholly situate within their respective provinces but which connect at provincial boundaries. Neither Parliament nor any of the adjacent provinces, acting alone, would have authority over the connecting arrangements. Parliament's powers to legislate in this area would be confined to arrangements between those undertakings which themselves span more than one province (e.g., CNCP) and those connecting with such systems. Even an exercise of jurisdiction under those limited conditions could be overridden by provincial laws, since the respective provinces would have paramount authority over all locally situated works and undertakings, whether wholly contained within provincial boundaries or extending beyond them.

The focus on the term "works and undertakings wholly situate within a province" in paragraph two of the provincial draft also gives rise to a potential conflict with Parliament's proposed paramount authority over "matters of a technical nature respecting management of the radio frequency spectrum." For example, the earth station segment of satellite communications would be excluded from Parliament's paramount authority because of provincial autonomy over the physical "works" or facilities. Management of the radio frequency spectrum requires careful restrictions on siting and standards of equipment used for transmitting earth stations (uplinks) and, indeed, for microwave installations. The wording of the proposal would appear to prevent Parliament from regulating the technical standards of such "works," even though it is generally accepted that the technical characteristics of the radio frequency spectrum require unitary management, both in respect to Canada's own needs and its rights and obligations under international treaties. The provincial draft appears to recognize the requirement of federal regulation of the "ethereal aspects" of the radio frequency spectrum, but it does not provide Parliament with the complete authority it needs in this respect.

A further deficiency in the powers allocated to the federal government by the provincial proposal relates to the fundamental matter of the free flow of information. The Prime Minister stressed this point at the Constitutional Conference in September 1980, in his introduction to the discussion of the communications proposals:

> Some provinces and I believe many or most have requested that . . . interprovincial or even international telephone services should be provincial. Here again I answer as I did on international trade, we cannot see a constitution which would permit a province to have the authority to interrupt telephone services between provinces to some other part of Canada, to some other part of the world.[81]

The provincial draft attempts to guard against the interruption of communications by providing that no law in relation to telecommuni-

cations works and undertakings "under this section shall in its pith and substance be directed to the disruption of the free flow of information." As a guarantee of free flow, this clause is faulty in several respects. One can easily conceive of laws primarily related to other matters such as language, consumer protection, and the use of particular telecommunications facilities, the ostensible object of which would not be the disruption of the free flow of information, but which would have that result.

The provincial proposal would only permit Parliament to intervene in this area in instances where the laws of two or more provinces conflicted so as to disrupt the free flow of information and if one of the provinces petitioned Parliament to enact a law to resolve a conflict. Two or more provinces would therefore need to be involved and Parliament would have to wait for a provincial petition before acting. This obviously would be unsatisfactory. In view of the national interest in maintaining an efficient and unimpeded exchange of information, ideas, and expressions of cultural identity among the various regions of Canada, Parliament should have an overriding power to ensure that this will occur.

Finally, by providing almost complete regulatory autonomy to each province, the consensus draft virtually eliminates the possibility of effective regulation of TCTS rates and services. Admittedly it may be questioned whether such regulation is necessary in view of the fact that for fifty years TCTS and the services that it provides have thrived in a largely unregulated state. Given the diverse characteristics of the TCTS members, the range of government, private-sector, and regional interests they represent, the requirement of unanimous approval by members of TCTS for all decisions, and the fact that interprovincial private-line services are offered in competition with CNCP, it is arguable that there are enough checks and balances in the existing arrangement to protect the public interest. Such an argument would be on sounder footing, however, if no relationship existed between interprovincial and local rates. Because such a relationship does exist, both in terms of the support TCTS revenues provide for local service and rate comparisons between intraprovincial and TCTS toll services over equivalent distances, each regulator must necessarily assess the reasonableness of TCTS rates in coming to an informed opinion on the reasonableness of local rates.

In its decision on the TCTS rate hearing, the CRTC stated the major criteria it considered should be applied in a determination of whether the TCTS rates for which Bell and B.C. Tel had applied were just and reasonable:

> The Commission considers that the aggregate of revenues from TCTS services should make an appropriate contribution to meet the overall revenue requirements of the applicants, having regard to the

other sources of revenues available to them, and the objective of maintaining reasonable levels of local and intra-company long distance rates. At the same time, the Commission considers that, in the public interest, rates for TCTS services should generally be set at levels which facilitate the flow of telecommunications across Canada. With particular reference to those TCTS services which are subject to competition, the Commission considers that these services should be offered on a compensatory basis, and that their contribution should be maximized consistent with demand and market conditions.[82]

Assuming that these are the kinds of tests that provincial regulators might wish to apply, it is clear that the provincial proposal would be inadequate for this purpose. As became clear in the TCTS rate hearing, the question of the appropriate contribution of TCTS revenues to the respective member companies could not be properly determined without comprehensive information on the costs incurred by each company in providing those services and the revenues earned from them.[83] Since all members participate in providing the services, detailed information on all of their costs and revenues would be required. Further, for such information to be of value, it would need to be prepared on a uniform basis by all members. The CRTC had difficulty in obtaining the information it considered it needed in respect to the provincially regulated members. It was necessary to subpoena the president of TCTS to obtain some of it and, in the end, the production of all of it could not be compelled because it was solely in the hands of the provincially regulated carriers, and neither Bell nor B.C. Tel had access to it through their participation in TCTS.[84] Similar difficulty would be caused by the exclusive nature of the authority each provincial regulator would have under the provincial proposal. Even if sufficient information could be obtained by co-operation among provincial regulators to allow them to make informed judgements on TCTS rates, an order by any one of them affecting such rates would have no extraprovincial authority. If individual regulators acted unilaterally in this respect, it is doubtful that TCTS could continue to function on the present basis of the negotiated and unanimous agreement of its members.

Federal Proposal-

The federal draft contains gaps in jurisdiction, but from the other side of the coin, with regard to the sufficiency of the regulatory authority proposed for each order of government. It proposes exclusive federal jurisdiction over spectrum management and over interprovincial and international telecommunications *services*, with provincial jurisdiction over,

92(Y) Telecommunications carrier works and undertakings in the province other than:

(a) national and international telecommunications carriers;

(b) space and satellite telecommunications carriers, including related earth stations;

(c) carriage on all or any telecommunications carriers in the province of telecommunications for a national purpose.[85]

The first exception to proposed section 92(Y) begs the fundamental question as to whether TCTS as an entity is itself a "national telecommunications carrier." If so, then federal jurisdiction would, on the basis of existing constitutional principles, also possibly extend to the "works" (i.e., physical facilities) of the TCTS member companies as well as the services they jointly provide. We believe, however, that the reference to "national and international telecommunications carriers" was only intended to cover CNCP, Telesat, and Teleglobe.

If that assumption is correct, would it be possible to regulate TCTS services federally without regulating the works and undertakings that provide such services? We believe that could be done provided that the federal regulator had unrestricted access to the costs and revenues of intraprovincial services in order to properly judge the rates for interprovincial and international services. It is questionable, however, whether a federal regulator would have the authority to compel production of this information under the federal draft, since the intent appears to give each level autonomy within its own sphere of regulation. A court might consider that the federal regulator would have such a power as one "necessarily incidental" to the general federal power. However, the potential for conflict exists and would be resolved only by a clear statement of federal authority over works and undertakings within a province to the extent they provide interprovincial and international services.

In addition to rates, there are other important areas relative to the services designated for federal authority that could have a direct impact on the facilities and operations of the provincial carriers. For example, in an important decision of May 1979, the CRTC ordered Bell Canada to permit CNCP to interconnect with Bell exchanges, thus enabling CNCP to offer its private-line and data communications services on a much wider basis within the territory served by Bell.[86] In approving the application, the commission concluded that enhanced competition in these services would be in the public interest. However, the CRTC currently has no authority to order interconnection with the provincially regulated systems. It is questionable whether the federal powers in the draft proposal are sufficient to order such system interconnection, since such powers are confined to the works and undertakings of "national carriers."

Similarly, there is the question of new entries of potential competitors into the telecommunications carrier field. While the stimulus to competition represented by such new undertakings is recognized, both levels of government have expressed concern over the potential of new entrants to "cream skim"[87] the lucrative markets and thereby jeopardize the ability of the major carriers to provide basic telephone services. In so far as the operations of new undertakings were confined within a province, authority over them would be exercised provincially. At the same time, such new undertakings might have a serious impact on a national carrier. It is not clear what authority, if any, the federal government would have in this situation.

Clear Delineation of Respective Spheres of Authority

One virtue of the existing regulatory framework is that it provides for "one stop" regulation for each carrier in Canada with regard to all of its rates and services. However, as the record of the TCTS rate hearing indicates, unitary regulation no longer provides a firm guarantee against regulatory overlap and potential conflict. If there is to be a reallocation of regulatory responsibilities to take account of the legitimate interests of both levels of government in this area, a form of two-tier regulation is probably unavoidable, at least for the member companies of TCTS. It may, therefore, be unrealistic to sing the praises of a system of "one-stop" regulation. However, as the operators of cable systems in Quebec found in the years immediately preceding the *Dionne* and *Capital Cities* judgments,[88] there is little to commend regulatory models that allow for conflicting or overlapping regulation. They only result in added costs, deterioration of service, and a general detriment to the consumer.

Provincial Proposal

The provincial draft would result in considerably less two-tier regulation than the federal proposal. Only those carriers with systems in more than one province would be subject to both levels of authority. The exclusive powers of provincial regulators over systems wholly contained within a province would extend to all matters except for the few noted previously.

However, for carriers with "works and undertakings" in more than one province (such as CNCP), the regulatory framework would be very confusing. Provincial laws would be paramount, in the event of conflict, over federal laws applicable to those same carriers. In addition to not addressing the issue of equitable regulation of the two major providers of interprovincial telecommunications services, this proposal would likely exacerbate federal/provincial disputes as to how competitive services should be regulated.

Federal Proposal

The federal draft provides for a full-blown system of two-tier regulation with a newly created national regulatory board having jurisdiction over all aspects of interprovincial rates and services provided by the provincial carriers. These carriers would look to their respective provincial public utilities boards or commissions for approval of their intraprovincial rates and services. Although it is not clear from the federal draft, or from the short discussion paper of 25 August 1980[89] that accompanied the proposal, we presume that the new regulatory board, rather than the CRTC, would also regulate the national and international telecommunications carriers (CNCP, Telesat, and Teleglobe). Otherwise the federal proposal would introduce a three-tier system of regulation — which would be unthinkable.

While there is a certain tidiness in the division of powers proposed in the federal draft, split regulation of this type would accentuate the need to allocate costs of the facilities used in common among the services regulated by each level of government.[90] This in turn would require agreement on a uniform costing approach, and in the absence of agreement, legislative authority to impose such an approach. Although there is provision made in the federal draft for consultation generally on all communications matters, there is no specific grant of authority over this vital subject. To avoid the inequities that would arise out of conflicting costing methods being employed in different jurisdictions, some overriding authority in this area would be required.

Other kinds of conflicts are inherent in some of the terminology used in the federal draft. For example, the phrase "the technical aspects of telecommunications" in proposed paragraph 91(X) is a very open-ended head of power. Under that rubric, the federal regulatory authority could attempt to exercise detailed regulatory jurisdiction over such matters as the construction plans of all of the telecommunications carriers in Canada and the performance standards for services provided by them.

It is even less clear what is meant by "carriage . . . for a national purpose" in paragraph 92(Y)(c). Would the federal regulatory authority thereby have jurisdiction over the terms and conditions under which microwave facilities are leased by the member companies of TCTS to the national broadcasting networks or to companies transmitting data from one province to another? Would all carriage on behalf of the federal government or its agencies be "for a national purpose"?

We have resisted in this paper a lawyer's temptation to minutely dissect the language in the drafts. However, the above examples and other ambiguities we have mentioned illustrate a basic lack of definition and precision in both drafts that make them very difficult to interpret. This is caused in part by the constraints imposed by the

attempt to adapt the proposals to the style of sections 91 and 92 of the BNA Act that allocate powers over a number of subjects in an abbreviated form. Much of the confusion over the extent of the jurisdiction claimed in each proposal could have been eliminated by treating "telecommunications" in greater detail in a separate section, with an interpretation clause defining terms by reference to specific carriers and subjects of regulation.

Consistent, Fair, and Efficient Regulation

The extent to which either proposal is likely to satisfy this test depends largely on the perspective of the interest group concerned. For convenience, those groups can be divided into three general categories: telecommunications carriers and their potential competitors, consumers or end users of telecommunications services, and manufacturers of telecommunications equipment.

Provincial Proposal

For the telephone companies, the provincial proposal would have the benefit of maintaining the current structure of one level of (provincial) regulation in most matters. The provincial boards have well-established application and hearing procedures. There is no reason to believe that the respective companies currently under federal regulation, and their customers, would be any less fairly and efficiently dealt with than they would be by a federal regulatory agency. Indeed, there is much to be said for provincially based regulators in day-to-day contact with local service needs.

For the providers of national and competitive services, the prospect of paramount provincial regulation would not be so bright. CNCP, for example, could potentially face a different set of ground rules in each of the provinces. Under provincial paramountcy, it is conceivable that each could assume authority for the regulation of CNCP's works and undertakings within the province, the rates charged for services, and the equipment that might be attached to its facilities. Depending on whether CNCP was viewed by provincial regulators as a threat or a stimulus to basic telephone service in the province, regulatory action could either restrict or enhance CNCP's activities.

In the area of system interconnection, for example, it is possible that certain provincial regulators might welcome the competition CNCP (or other entrants) would provide to the privately owned telephone companies, while others might take a more restrictive view, not wishing to encourage any enterprise that might reduce the revenues of the provincial telephone companies. For example, the Alberta Public Utilities Board has recently taken the position that system interconnection should be allowed "in those cases where it is necessary to ensure effective competition in the provision of non-basic telecom-

munications services."[91] On the other hand, Saskatchewan Telecommunications has consistently taken the view that both its enabling statute and the cross-subsidies required to provide universal telephone service in the province require it to be the only telecommunications carrier in Saskatchewan.[92]

With the explosion of data and teletext[93] services likely to occur over the next decade, new carriers offering specialized services will doubtless wish to establish their own microwave transmission facilities and offer point-to-point voice and data services. In the United States, such carriers have, since 1978, been permitted to offer interstate switched voice toll services in competition with the telephone companies.[94] The United States has also seen the growth of "resale" or "value added" carriers, who lease circuits from the established carriers for special services to selected customers.[95] For such specialized carrier services to develop in Canada, they would require in most instances a national customer base. Under the provincial proposal, this would require the permission of multiple regulatory authorities. Even if we were to assume that there were a sufficient number of willing jurisdictions to enable such services to be introduced, it is quite possible that the conditions of such permission in at least some of the provinces could be onerous enough to make the viability of such enterprises doubtful.

If the provincial draft were implemented, one would also have to question the future role cable companies and radio common carriers would be allowed to play in offering services in competition with telephone companies. For example, some cable operators are currently offering security and medical alarm services, and view teletext and local data transmission services as areas of substantial potential growth. Under the provincial proposal, all such non-broadcasting services would be provincially regulated, presumably by the same authorities responsible for the telephone companies, some of whom might seek to protect the revenue base of the provincial telephone companies. At a minimum, one could expect that rate supervision for all services offered by cable companies would be substantially greater and more closely aligned with telephone rate regulation than it presently is under the CRTC.

Because of the variety of interests represented by consumers of telecommunications services, it is difficult to identify winners and losers under different jurisdictional scenarios. For example, consumers are generally considered to be the principal beneficiaries of enhanced competition, through an increase in the range of services available and lower pricing. To the extent that the provincial proposal might result in sheltering provincial telephone companies from competition, certain consumer interests would not be well served. However, to the extent such protection preserved economies of scale[96]

in provincial telephone systems and permitted greater cross-subsidies, there would be benefits to other consumer interests. As a general matter, one would expect a greater regulatory bias in favour of users of basic telephone services under the provincial proposal than the federal, since the focus of the latter would be exclusively on interprovincial and international services.

Under the provincial proposal, manufacturers of telecommunications equipment could be faced with ten or more sets of regulations and policies relating to terminal and other equipment to be used in conjunction with the various telephone systems in Canada. Although there is no provision for the setting of national standards under that proposal, it is conceivable that this could be done on a co-operative basis by the provincially regulated carriers, as is done to an extent at present.

Federal Proposal

The federal proposal (see Appendices B and C) would in all probability provide for more consistent and equitable regulation of competitive services offered on a national basis. However, regulation by two levels of authority would result in more expensive regulation for carriers providing such services, including the provincial telephone companies. As noted, cost separations between intra- and interprovincial services would be required, in order that each regulator could ascertain the relative degree of contribution of these two basic categories of services to the companies' overall revenue requirements.

The experience of regulators in the United States with cost separations is instructive. In evidence given at the TCTS rate hearing, the former chairman of the Federal Communications Commission (FCC), Richard E. Wylie, noted that in the United States an appropriate method for separating or allocating the cost of telephone plant used in common for both intrastate and interstate services is essential in order that the state and federal regulators may determine for their respective rate-making purposes the investment, expenses, reserves, taxes, and revenues applicable to each of the services subject to rate regulation by each of them. Over the years, different and more complex separation plans have evolved. There has been political pressure from the state level to shift increasing amounts of common costs to the interstate services in order to keep local exchange rates as low as possible. After reviewing the various separation formulae that have been developed, Mr. Wylie concluded his evidence by stating:

> Without question, the fundamental problem with the whole concept of separation is that it is an artificial allocation of costs predicated on political boundaries. Technological breakthroughs in long haul transmission, including microwave and satellite, have drastically

> cut the costs of most of the telecommunications services subject to the jurisdiction of the FCC. Conversely, the costs of providing local services has not yet benefited equally. The investment in the local distribution plant is primarily a function of the number of subscribers, and of the facilities necessary to wire each household to central office. Those costs, which are subject to the rate regulatory jurisdiction of the states, have steadily increased.
>
> In this bifurcated regulatory environment, and considering the traditional cost characteristics of the nation's telephone system, the pressures on the FCC (both from the states and the Congress) to shift as much of the disproportionate burden of cost increases to the interstate revenue requirements were tremendous.[97]

It is entirely likely that the same pressures would be felt in Canada under the divided jurisdiction contemplated by the federal draft. The inordinate amount of time and expense that Mr. Wylie's testimony reveals has been expended in devising cost separation formulae acceptable to both levels of authority in the United States is a formidable argument against the federal proposal. At the same time, there appears to be a regulatory trend in both countries to determine more accurately than in the past the true costs of specific services for both settlement and rate-making purposes. Mr. Wylie speaks of strong "countervailing pressures" for more cost-related separations and the FCC's "achievement in requiring all interstate monopoly carriers to cost justify their rates."[98] In its decision on the TCTS rate hearing, the CRTC stated that "the costs used for revenue settlement purposes should be congruent with those used in deriving service costs for rate approval purposes."[99] The commission also directed:

> In future applications for rate changes for TCTS services, the Commission will expect the provision of information with respect to the level of contribution from TCTS services so that meaningful cost/revenue relationships may be established among the applicants' TCTS, intra-company toll, and local service categories, and between the monopoly and competitive service categories.[100]

It would appear, therefore, that more sophisticated cost allocation methods for common facilities will be needed in Canada even under the existing regulatory structure. Viewed from this perspective, the cost separations that would be required in the federal proposal may not be so great an obstacle.

As already noted, joint federal/provincial action in this area would be necessary. In the United States, the Communications Act requires the FCC to convene a federal-state joint board in any "proceeding regarding the jurisdictional separation of common carrier property and expenses between interstate and intrastate operations."[101] The

joint board, consisting of four state commissioners and three FCC commissioners, recommends a decision to the FCC, which has final authority in the matter. A mechanism such as this would be desirable in the federal proposal.

As in the provincial proposal, there would be winners and losers within the consumer sector if a full two-tier method of regulation were implemented. The federal regulatory bias in favour of low-cost national services might result in diminished cross-subsidization of local exchange services by interprovincial services, with resulting increases in local rates. Adverse effects on local rates in certain provinces would also likely occur if the Revenue Settlement Plan were to be readjusted in a major way, such as shifting more common costs to basic services or dividing revenues more discretely according to each member's particular involvement in the provision of TCTS services. National business users would likely be the principal beneficiaries of national interconnection standards, to the extent that they had operations in more than one province that required the use of compatible terminal equipment.

Most manufacturers of telecommunications equipment would obviously favour the introduction of national standards for terminal equipment, particularly since federal policy to date in this regard has been more liberal than has been that of the provinces. Canadian manufacturers of such specialized equipment as satellite earth receiving stations and data and teletext terminals would likely welcome a system of uniform standards. It should be recognized, however, that under the existing system of divided jurisdiction, the telephone companies have found it in their mutual interest to introduce a high degree of equipment standardization with a minimum degree of government intervention.

Conclusion

The foregoing analysis illustrates not only the inherent weaknesses in the two proposals but also the formidable problem of dividing powers in a field as complex and interrelated as telecommunications. Neither proposal is satisfactory if measured against the criteria we have selected. Of the two, the federal proposal, as modified in the discussion paper of 25 August 1980 (Appendix C), comes substantially closer to meeting these tests than does the provincial draft.

In considering other possible models involving basic transfers of powers, all seem to present major difficulties. Certainly, any model based on exclusive federal or provincial jurisdiction would not fairly reflect the stake that each level has in the telecommunications sector. Moreover, we think it would be unlikely that regulators operating from a purely provincial or federal base would be fully responsive to all affected interests.

As well, we do not believe that a single regulatory authority with joint federal and provincial participation exercising jurisdiction over the entire field would be a satisfactory solution. Notwithstanding the benefits of unitary regulation such a model would provide, it fails to recognize the justifiable areas of interest of each level of government. Local exchange and intraprovincial toll services and rates are matters that in most cases are appropriate for exclusive provincial authority. Similarly, satellite services and the management of the radio frequency spectrum are examples of matters that are of national scope and importance over which the federal government should exercise exclusive jurisdiction.

We believe, therefore, that any rearrangement of regulatory authority must accommodate both separate and shared powers, that is, the constitutional principle of concurrent jurisdiction must be clearly recognized in a revised regulatory structure. Before discussing such a rearrangement, however, the fundamental question to be addressed is why the existing regulatory structure might not be the most desirable model, if coupled with certain administrative and consultative arrangements between the two levels of government that would facilitate regulation in areas of mutual interest.

The existing regulatory structure, which has evolved from the time of Confederation, has a number of positive attributes. Under it, Canadian undertakings have developed into a comprehensive, varied, and efficient telecommunications system that is responsive to both local and national needs. Each carrier is subject to one level of regulation in most respects, thereby permitting a single regulator to balance competing interests and economic values in arriving at decisions on rates and services. The division of powers is rooted, as we have seen, in the historical development of telecommunications services in Canada and has a certain practical rationale.

Notwithstanding such benefits, however, one must ask whether the current regulatory framework will be adequate to meet the needs of the future in view of developing technologies and, in particular, the trend towards new data and information services that will make increasing use of multiple carrier systems throughout Canada. The TCTS rate hearing provided ample evidence of the potentially conflicting federal and provincial interests in the area of interprovincial services. Factors such as the desirable balance between revenues from such services and from local exchange and intraprovincial toll services, the need for comprehensive cost and revenue information from all participating companies to address this issue, the related need for uniform costing and accounting practices, and the question of the appropriate costing and pricing of competitive services, all of which were important issues in the hearing, strongly indicate the need for greater co-ordination between federal and provincial regulatory authorities.

Theoretically, such co-ordination could be accomplished by inter-agency consultative mechanisms, without the necessity of new regulatory structures and formal transfers of powers. There are several examples of such co-operative actions carried out in the past. In 1977, the CRTC appointed a committee of inquiry comprised of representatives from the CRTC and the regulatory authorities in British Columbia and Ontario to submit a report on a dispute between the City of Prince Rupert and B.C. Tel respecting a proposed new interconnection agreement between their respective telephone systems. In its decision, which adopted in large measure the recommendations of the committee, the CRTC stated:

> The Commission notes that cooperation among the federal and provincial representatives on the committee was extensive. Hopefully, this will serve as a model for future cooperation between federal and provincial agencies in the telecommunication field, particularly on matters where jurisdiction is divided between them. The Commission attaches considerable importance to cooperative efforts on such matters and in this particular instance wishes to thank the provincial agencies for their important contribution.[102]

Again, in preparing for the TCTS rate hearing, the CRTC established an inter-regulatory committee, comprised of representatives from the commission and provincial agencies, to offer advice on the terms of reference of the hearing and, in particular, on the preparation of the consultant's report on the Revenue Settlement Plan. In a public announcement, the CRTC emphasized the appropriateness of such co-ordinated action in that proceeding because "the impact of TCTS rates and practices is felt directly or indirectly by every telephone company in Canada."[103]

Given a spirit of willingness, we think this kind of inter-agency co-operation is achievable on a much wider scale. It is perhaps too early in the day to reject the flexibility of such arrangements in favour of the creation of jealously guarded, watertight compartments of exclusive regulatory jurisdiction.

At the same time, the authors are conscious of the increasing importance of matters such as system interconnection, new entry, and the issues raised in the TCTS rate hearing that give rise to serious jurisdictional conflicts. The positions of governments on some of these issues may be too entrenched to be resolved by negotiations. Furthermore, although each order of government has decided for its own reasons to allow the existing jurisdictional house of cards to stand, it is almost inevitable that some of the new entrants in the field (whether users or providers of telecommunications services) will challenge the shakier jurisdictional underpinnings to the regulatory structure if it is not shortly put on a firmer foundation.

In order that the telecommunications industry maintain its vigour and not languish in a climate of regulatory uncertainty and dispute, overriding authority to deal conclusively with such issues should be placed somewhere. In view of both the local and national aspects of these matters, we do not believe it appropriate that final authority over them should be exercised exclusively either by the CRTC or by provincial authorities acting along or in concert.

We are therefore drawn inevitably to the concept of a new, regulatory board with powers similar to those contemplated in the federal proposal and with a membership capable of reflecting the interests of both levels of government in national telecommunications. If a change in the present structure of regulation is required, we think the model described below might be appropriate and would be least disruptive of existing institutional arrangements.

The new board would be created by federal legislation providing for its membership, powers, sittings, staff, and administration. The enabling statute would also contain an introductory set of national telecommunications policy objectives that would guide the board in reaching its decisions on specific applications. Provincial and federal agreement on such policy principles or objectives prior to enactment of the enabling legislation would greatly assist in getting the board off on a strong footing. A prior consensus would also encourage maximum co-operation among board members in striving to reach decisions consistent with the national telecommunications policy objectives. Certain of the objectives that were contained in the proposed federal Phase II telecommunications legislation, and on which such agreement has largely been obtained, might provide the basis for federal/provincial agreement on a statutory national telecommunications policy.[104]

The powers of the new board would include, at a minimum, approval of rates for services linking two or more provinces, connecting agreements between systems serving two or more provinces, new entries into the telecommunications carrier field where the services offered extend beyond the boundaries of a single province, and terminal interconnection of network-addressing telecommunications equipment. All of the above-mentioned issues involve telecommunications services with an interprovincial or national dimension and would be appropriate subjects to be entrusted to a national regulatory agency.

At the same time, decisions on such matters could also have important consequences for local systems. We believe it essential, therefore, that membership on the board include persons experienced in the regulation of provincial telephone systems who would contribute to the board's deliberations first-hand knowledge of such systems and of local regulatory concerns. In our view, the best candidates for

such positions would be members of those provincial boards that would continue to exercise authority over the intraprovincial services of Canada's telecommunications carriers. In addition to their knowledge of local conditions, such persons would be experienced adjudicators in the legal and technical issues that arise in telecommunications proceedings.

While it could be argued that each of the provinces and territories should be individually represented on a national board and that equal representation should be provided from the federal side, the resulting board might have in excess of twenty members. A board of such size would be unwieldy, especially in its decision-making functions. Moreover, we doubt that its work-load would justify such numbers. Accordingly, we would recommend a board of nine members, all federally appointed, six of whom would be drawn from provincial authorities having jurisdiction over telecommunications regulation. The chairmen or vice-chairmen of such provincial authorities would be excellent candidates for these positions. In order to provide a direct link to local regulatory concerns, these members would continue to sit on their respective provincial boards, as well as the national body. Although they would be full participants in the decision-making process, we would expect that they would continue to reside in their respective provinces, just as part-time members of the CRTC currently do. Approximate geographic and demographic representation could be achieved if the provincial representatives were appointed on the following basis: two from the four western provinces, one from Ontario, one from Quebec, and two from the Atlantic provinces.

The three remaining members would be engaged full-time in the day-to-day administration and operation of the new national regulatory agency. Backgrounds in law, accounting, economics, and/or engineering would be useful but not necessarily essential qualifications for these members. The board's chairman would be appointed from this group. Although the full-time members would function as a kind of executive committee, all members would have equal voting status with respect to the policies, regulations, and decisions promulgated by the board.

The suggested composition of the board would result in two thirds of the members being continuing active members of provincial regulatory agencies. In some past proposals for so-called "joint" regulatory bodies, attention has been focused on the most desirable balance of federal and provincial appointees. For example, the federal proposal discussed in this paper envisages a board of eleven commissioners, six appointed by the federal government and five by the provincial governments. We doubt that it would be necessary or even relevant to attempt to balance in some manner provincial and federal viewpoints through the appointment process. There are several factors that we

believe would mitigate against board members aligning themselves rigidly with federal or provincial positions in arriving at their decisions. As a general rule, the character and functions of administrative tribunals, as quasi-judicial bodies, tend to motivate members to transcend their personal biases in arriving at decisions that are fair to the competing interests on which they have to adjudicate. In our proposal, the provincial representatives would be sitting members of administrative tribunals accustomed to bringing impartial judgements to bear on the applications they hear. As well, the variety of geographic interests that would be represented on such a board would of itself tend to act as a check against certain members asserting purely parochial interests. A wider vision would be further induced by the guiding statutory principles discussed above, and by membership in a group charged with the responsibility of supervision of interprovincial and national telecommunications.

Administratively, the board would function like any other federal or provincial tribunal. Regular business meetings would be held to discuss decisions and policy issues. One of the most important of the board's early functions would be to work towards a uniform system of costing and accounting that could be applied by telephone companies across Canada so that their revenue requirements could be judged by both federal and provincial regulators on the same basis.

Permanent staff assigned to the board would supply advice and support services to the members. Although the core would be federal public servants, staff from provincial departments of communications or tribunals with jurisdiction over telecommunications could be loaned to the national board in the same way that staff from member companies are loaned to TCTS on a rotating basis. In this way, a two-tier flow of information on federal and provincial regulatory issues could be maintained at the staff level.

Bearing in mind the time demands on part-time members who would have continuing responsibilities on their own boards, provision would be made for small panels to hear and dispose of applications. We would recommend a quorum of three with the requirement that one be a full-time member in order to provide continuity and facilitate consistency in the decision-making process. The hearing panels would have final decision-making authority, subject to the possibility of internal review described below. The size and composition of panels for particular applications would be in the discretion of the chairman. It is anticipated, however, that larger panels than the quorum of three would be required for matters of national or industry-wide scope. For example, a TCTS rate hearing or an issue hearing on costing or accounting procedures should involve as many of the board as possible.

We would recommend a mechanism for internal review of decisions similar to that currently provided in section 63 of the National

Transportation Act,[105] which permits the CRTC to "review, rescind, change, alter or vary" any order or decision made by it relating to telecommunications.[106] The Canadian Transport Commission exercises the same internal review power over decisions taken by it in relation to transportation matters. Such a review power would be particularly useful in cases where smaller panels were involved in decisions on regional matters (i.e., connecting agreements between two provincial systems) that could potentially have broad implications for the industry, or for the manner in which telecommunications services were offered in other parts of the country. A procedure for internal review would give the board as a whole an opportunity to appraise these wider implications and, in general, to be assured of the correctness of decisions made in the first instance.

The review power should be used sparingly in order that the board not become bogged down in continuous review of its decisions. Applicants requesting review of a decision should be required to satisfy, on a prima facie basis, criteria similar to those established by the CRTC as a prerequisite to the exercise of its power of review. Applicants before the CRTC must demonstrate an error in fact or law in the decision, a fundamental change in circumstances or facts since the decision, a new principle arising out of the decision or, more generally, substantial doubt as to the correctness of the original decision.[107]

In addition to review by the board itself, the normal rights of judicial review would exist. As a federal board, these would include an appeal to the Federal Court of Appeal on questions of law or jurisdiction,[108] and applications to the Trial Division of the Federal Court for remedies such as injunctive relief and the prerogative writs.[109]

The federal proposal for a new regulatory board, outlined in the statement of 25 August 1980, states that the normal appeal procedures would apply to decisions of the proposed board including petitions to the Governor in Council. Such "political appeals" have been the subject of considerable controversy in recent years. Legal commentators have criticized a procedure that allows decisions of tribunals arrived at on the basis of a carefully developed record to be set aside for reasons quite extraneous to the facts and issues examined in the original proceeding. As well, parties have not always been given notice of or an opportunity to respond to petitions presented to the Governor in Council that may affect their rights. It appears that there is no legal obligation on the Governor in Council to give such notice or right of reply. The Supreme Court of Canada has recently ruled that the Cabinet is under no obligation to adhere to procedural fairness in dealing with such petitions.[110]

Both the Royal Commission on Financial Management and Accountability (the "Lambert Commission") and the Law Reform Commission

of Canada have recommended the abolition of such appeals.[111] The latter commission in its study on federal independent administrative agencies has noted the confusion caused by the existence of legal and political appeals as to the choice of the appropriate body to which to direct applications for review and as to what procedures or tactics to follow.

> Although appeals to courts are grounded on accepted standards and restricted to matters of record or, occasionally, clearly enunciated new material, Cabinet "appeals" are quite different. They are really policy appeals replete with lobbying external to any formal written representations made, and allow for reversal on grounds of "evidence" unrelated to the considerations an agency may have regarded as relevant. Such review may have a detrimental effect on agencies and detract from the integrity of the administrative process in the eyes of those who are parties to proceedings before agencies. To be reversed on such an appeal can be demoralizing and can contribute to a less than conscientious approach to agency responsibilities. This is particularly so when the appeal is not well documented and the reasons obscure.[112]

We agree with these objections and would recommend that no Cabinet power to vary or rescind decisions of the new board be provided for in the enabling legislation.

At the same time, we believe that the responsibility for policy development in the field of national telecommunications should reside ultimately not with the board but with the governments concerned, and that a mechanism should be provided to give policy guidance to the new board without damaging its hearing processes and credibility. We would therefore favour a system by which policy directives could be given to the board but subject to certain procedural and consultative safeguards. First, the enabling legislation should make prior consultation between federal and provincial ministers of communications mandatory before the issuance of a directive. Further, as the Lambert Commission and others have recommended, both the agency and the public should be consulted before directives are made final.[113] Finally, such directives should not pertain to specific cases before agencies but only to broad policy matters. In the case of the board discussed here, exclusions from the directive power would be included in the legislation. For example, in each of the recent telecommunications bills introduced into Parliament, matters excepted from the directive power have included "the charges to be levied for particular telecommunication services or facilities or the revenue requirements of a particular telecommunication carrier."[114] The idea underlying that proposed exemption is that governments should not attempt, through the power of direction, to impose their judgement with regard

to specific applications before the board, but rather should restrict themselves to establishing the policy guide-lines within which such specific decisions should be taken by the independent, quasi-judicial board.

In summary, if a change in the alignment of regulatory powers over telecommunications is deemed necessary, we would favour a division on an inter/intraprovincial basis with responsibility for interprovincial, national, and international services (to the extent the last are regulated) devolving upon a new board. If the board were constituted in the manner described, the potential for overlapping or conflicting regulation in the resulting two-tier system would be largely reduced. The participation of sitting members of provincial tribunals on the national board would help to overcome this problem by keeping both the federal and provincial levels sensitive to potential areas of conflict and the need to reconcile them.

A question remains as to the role of the CRTC under the proposed scheme. In order to avoid three-tier regulation, we would recommend that the CRTC's authority over the companies it presently regulates be reallocated as follows. Because of Telesat's membership in TCTS and the integration of satellite and terrestrial telecommunications services under the TCTS connecting agreement, Telesat should be regulated by the national board. CNCP, as the provider of national services in competition with those offered by TCTS, should also fall within the jurisdiction of the national board.

This leaves for consideration Bell Canada, B.C. Tel, Terra Nova Tel, and NorthwesTel, all presently regulated by the CRTC. Because the systems of the last three are confined within provincial or territorial borders, it would seem appropriate that they be regulated by local authorities except for those matters allocated to the national board.

It is arguable that because of Bell Canada's size, its operations in Ontario, Quebec, and the territories, and its ownership interests in the Atlantic provinces, it has a national character and importance that would justify it being regulated by the new board both as to intra- and interprovincial operations. This would give the board a comprehensive overview of all of a major carrier's services and their revenue and cost relationships which, in turn, would be of assistance in the board's decisions respecting other carriers.

However, consistency in the scheme proposed for realignment of authority between federal and provincial levels of government would demand that Bell's intraprovincial operations be regulated by provincial or territorial authorities. To facilitate such regulation, Bell would need to divide its corporate activities into separate divisions or companies serving the respective jurisdictions, and the relevant provincial and territorial governments would have to be prepared to assume the responsibility of regulating Bell's intraprovincial operations.

If any of the provincial or territorial governments to whom federal jurisdiction would be transferred under this proposal did not wish to assume such responsibility, the national board would regulate the local as well as the interprovincial operations of the companies concerned. Ontario so far has disclaimed a serious interest in regulating Bell Canada and, if this position is maintained, might be content to participate in the regulation of Bell solely through the national board.

Finally, and most importantly, we believe that the creation of the new board, and the transfer of powers discussed above, could and should be accomplished without constitutional amendment. As was apparent from our earlier legal analysis, we hold the view that the federal government currently has the jurisdiction to enact legislation establishing a national, regulatory body with the powers we have described. In dealing with technologies and services that are constantly changing, we think it would be counter-productive to attempt to define in a constitution appropriate areas of jurisdiction. As the history of attempts to amend the BNA Act, or even to reach agreement on an amending formula, has so clearly indicated, it is much easier to amend legislation than it is to amend a constitution.[115]

In the model proposed above, we would foresee the continuation of regular consultations between federal and provincial ministers of communications with respect to the appointment of new part-time and full-time members, the regulatory practices of the new board, and amendments to the enabling legislation as political and technological developments might require. We discussed earlier the requirement of mandatory consultation between both levels of government before the issuance of policy directions. The policy positions of both levels of government on particular issues or applications could also be put before the new board by way of direct intervention and appearance, as is currently done by Ontario, Quebec, and British Columbia in telecommunications proceedings before the CRTC. These governments are regularly represented by counsel who cross-examine applicants' witnesses, adduce evidence, and make final arguments.

The success of any new model of regulation involving a realignment of powers will require a commitment by both levels of government to make it work. Such co-operation will obviously not be achieved if either side acts unilaterally to impose a system of regulation, whatever its constitutional justification may be. In the model proposed, both sides must recognize the need for joint action and be prepared to supply all of the resources and information required for the national board to function effectively.

Notes

[1] *The British North America Act*, 1867, 30 & 31 Vict. c. 3.

[2] Telecommunications means "any transmission, emission or reception of signs, signals, writing, images or sounds or intelligence of any nature by wire, radio, visual or other electromagnetic system." *Interpretation Act*, R.S.C. 1970, c. I-23, s. 28.

[3] Terms of Reference, The Institute for Research on Public Policy. See Preface.

[4] *Re: Regulation and Control of Radio Communications*, [1932] A.C. 304 (P.C.).

[5] *Capital Cities Communications Inc.* v. *CRTC*, [1978] 2 S.C.R. 141; 81 D.L.R. (3d) 622.

[6] *La Régie des Services Publics* v. *Dionne*, [1978] 2 S.C.R. 191; 83 D.L.R. (3d) 181.

[7] *Toronto Corporation* v. *Bell Telephone Company of Canada*, [1905] A.C. 52 (P.C.).

[8] See, for example, C.M. Dalfen, "Constitutional Jurisdiction Over Interprovincial Telephones Rates," (1970), 2 *Canadian Communications Law Review* 177.

[9] For a description of the statutory responsibilities and operations of the CRTC, see C.C. Johnston, *The Canadian Radio-television and Telecommunications Commission, A Study of Administrative Procedure in the CRTC*, study prepared for the Law Reform Commission of Canada (Ottawa: Minister of Supply and Services Canada, 1980).

[10] *Bell Canada, British Columbia Telephone Company and Telesat Canada: Increases and Decreases in Rates for Services and Facilities Furnished on a Canada-Wide Basis by Members of the TransCanada Telephone System, and Related Matters*, Telecom. Decision CRTC 81-13, 7 July 1981 at 23-24.

[11] *Re: Alberta Government Telephones and Canadian Radio-television and Telecommunications Commission et al.* (1980) 114 D.L.R. (3d) 64.

[12] *Radio Reference*, [1932] A.C. 304 (P.C.); *Re: Regulation and Control of Aeronautics in Canada*, [1932] A.C. 54 (P.C.); *Luscar Collieries Ltd.* v. *McDonald et al.*, [1927] A.C. 925 (P.C.); *Pronto Uranium Mines* v. *Ontario Labour Relations Board*, [1956] O.R. 862 (Ont. S.C.).

[13] *A.G. Canada* v. *A.G. Ontario*, [1898] A.C. 700 (P.C.); *A.G. Canada* v. *A.G. B.C.*, [1930] A.C. 111 (P.C.); *R.* v. *Smith*, [1972] S.C.R. 359; *Fulton* v. *Energy Resources Conservation Board* (1980), 19 A.R. 616.

[14] W.R. Lederman, "Telecommunications and the Federal Constitution of Canada," in H.E. English, ed., *Telecommunications for Canada: An Interface of Business and Government* (Toronto: Methuen, 1973) at 340.

[15] *Ibid.* at 341.

[16] One significant exception to this general statement is that Lloydminster, Saskatchewan is served by Alberta Government Telephones (AGT).

[17] C.M. Dalfen, "The Telesat Canada Domestic Communications Satellite System," (1969), 1 *Canadian Communications Law Review* 182.

[18] Connecting Agreement dated 31 December 1976; reproduced in 3 C.R.T. 292 (1977).

[19] *Canadian Pacific Limited* v. *Telesat Canada* (1981), 32 O.R. (2d) 197, (Ontario High Court). (Note that decision is currently under appeal.)

[20] *Radio Act*, R.S.C. 1970, c. R-1.

[21] For a description of the operations of radio common carriers, see *Challenge Communications Ltd.* v. *Bell Canada*, Telecom. Decision CRTC 77-11, 7 October 1977, (1977) 3 C.R.T. 489; *Bell Canada* v. *Challenge Communications Limited* (1978) 22 N.R. 1; (1978), 85 D.L.R. (3d) 351 (Fed. C.A.). See also D.G. Hartle, "The Regulation of Communications in Canada," *Government Regulation: Issues and Alternatives — 1978* (Toronto: Ontario Economic Council, 1978) 137.

[22] *Canadian Radio-television and Telecommunications Commission Act*, S.C. 1974–75–76, c. 49.

[23] *Broadcasting Act*, R.S.C. 1970, c. B–11.

[24] *Supra*, note 20. Note that the regulation of radio common carriers exercised by the minister pursuant to the Radio Act and its Regulations is limited to spectrum management. Services are not regulated with respect to price nor is the industry subject to rate-of-return regulation.

[25] See text, *infra*, at 125.

[26] Supervisory responsibilities for Saskatchewan Telecommunications (Sasktel) are allocated to three bodies: the Crown Investment Corporation for financial matters; the Communications Secretariat (Minister of Telephones) in respect of policy issues; and the Provincial Cabinet as regards overall regulatory responsibility.

[27] TransCanada Telephone System, Submission of the TCTS in Response to the Discussion Paper of the Parliamentary Task Force on Regulatory Reform, September 1980.

[28] *Ibid.*

[29] The following definitions may be helpful to those not familiar with the terms used in the text:

"Terminal interconnection" refers to the attachment of terminal equipment to the communications network at a terminal, that is, a point at which information can enter or leave the system. In turn, a terminal is an input/output device designed to receive and/or send messages.

"System interconnection" refers to the connection of the systems of two carriers. A system may be defined as a set of equipment, apparatus, and other plant combined to perform a function within the carrier's telecommunications network.

[30] E.B. Ogle, *Long Distance Please: The Story of the TransCanada Telephone System* (Toronto: Collins, 1979).

[31] *Supra*, note 27.

[32] See CRTC Public Notice, *Public Hearing Respecting TCTS Rates, Practices and Procedures*, 18 September 1974.

[33] *Ibid.* The process was facilitated by the establishment of an interregulatory committee and regular meetings between the applicants and the consultants under the auspices of the CRTC.

[34] *Supra*, note 10.

[35] Johnston, *supra*, note 9, Ch. 5.

[36] M. Denny, M. Fuss, C. Everson, and L. Waverman, "Estimating the Effects of Diffusion of Technological Innovations in Telecommunications: The Production Structure of Bell Canada," Working Paper No. 7913 (Toronto: University of Toronto, Institute for Policy Analysis, 1979).

[37] Department of Communications, *Instant World* (Ottawa: Information Canada, 1971).

[38] *CNCP Telecommunications — Partnership Agreement and General Rate Increase*, Telecom. Decision CRTC 81–2, 14 January 1981.

[39] *Bell Canada Special Act*, S.C. 1880, c. 67, as amended.

[40] *An Act to Amend the Railway Act, 1903*, 6 Edward VII, c. 42, ss. 29–34.

[41] *An Act respecting the Bell Telephone Company of Canada*, 55-56 Vict., c. 67.

[42] T. Cashman, *Singing Wires: The Telephone in Alberta* (Edmonton: Alberta Government Telephones Commission, 1972).

[43] Ogle, *supra*, note 30.

[44] *Ibid.* at 163.

[45] *Ibid.* at 132.

[46] *Ibid.* at 131.

[47] *Ibid.* at 149–50 and 153–54.

[48] This task has been performed by others including Dalfen, *supra*, note 8, Lederman, *supra*, note 14; C. H. McNairn, "Transportation, Communication and the Constitution: The Scope of Federal Jurisdiction," (1969), 47 *Canadian Bar Review* 355.

[49] *Johannesson* v. *West St. Paul*, [1952] 1 S.C.R. 292.

[50] *Munro* v. *National Capital Commission*, [1966] S.C.R. 663; *Re. Offshore Mineral Rights of B.C.*, [1967] S.C.R. 292.

[51] *A.G. for Ontario* v. *Canada Temperance Federation*, [1946] A.C. 193 (P.C.), at 205–6.

[52] *Reference Re. Anti-Inflation Act*, [1976] 2 S.C.R. 373; 68 D.L.R. (3d) 452.

[53] *Anti-Inflation Act*, S.C. 1974–75–76, c. 75.

[54] *Supra*, note 52 at 451–61, per J. Beetz, who adopted a thesis advanced by Lederman as to the two functions of the federal general power. See W.R. Lederman, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation," (1975), 53 *Canadian Bar Review* 597.

[55] Lederman, *supra*, note 54 at 610.

[56] *Supra*, note 7.

[57] *Radio Reference*, *supra*, note 4 at 315, per Viscount Dunedin.

[58] *Luscar Collieries Ltd.* v. *McDonald et al.*, [1927] A.C. 925 (P.C.).

[59] *Ibid.* at 932.

[60] *The Queen* v. *Board of Transport Commissioners* (1968) 65 D.L.R. (2d) 425 (S.C.C.) ("GO Transit" case).

[61] *City of Montreal* v. *Montreal Street Railway Company*, [1912] A.C. 333 (P.C.).

[62] Of interest in this context, note that the Judicial Committee of the Privy Council in *Luscar Collieries*, *supra*, note 58, chose not to refer to *Montreal Street Railway*, *supra*, note 61, although that case was cited in argument.

[63] *A.G. for Ontario* v. *Winner*, [1954] A.C. 541 (P.C.), per Lord Porter, at 580, "The same buses carry both types of passenger along the same routes; journeys may have been different, in that one was partly outside the province and the other wholly within, but it was the same undertaking which was engaged in both activities."

[64] In *Re: Tank Truck Transport Ltd.*, [1960] O.R. 497 (Ont. H.C.), the Ontario High Court was asked to decide whether the Ontario Labour Relations Act applied to an Ontario trucking company delivering some of its loads into Quebec and the United States. Although the applicant's trips to points outside Ontario represented only approximately 6 per cent of the company's total business, the court rejected the argument that the *Winner* case required the interconnecting function to be the main activity in order that the undertaking come within the exception in section 92(10)(a).

The same conclusion was reached in *Regina* v. *Cooksville Magistrate Court, ex parte Liquid Cargo Lines Ltd.*, [1965] 1 O.R. 84 (Ont. H.C.), where, in a similar fact situation, only 1.6 per cent of the loads hauled by the company's vehicles during a year-and-a-half period were made to points outside Ontario.

[65] In *R.* v. *O.L.R.B., ex parte Northern Electric Company*, [1970] 2 O.R. 654 (Ont. H.C.), the Ontario High Court was presented with the situation in which a corporation had in fact structured its affairs so that the interprovincial aspects of its business fell within the functions of its corporate subsidiary. The court refused to be bound by the corporate structure of the entity before it, and held that the relationship between the

Installation Department of Northern Electric Company Ltd. and its parent company, Bell Telephone, was such that "on balance the former forms an integral and necessarily incidental part of the latter."

[66] *Supra*, note 4.

[67] Minister of Communications, *Proposals for a Communications Policy for Canada: A Position Statement by the Government of Canada* (Ottawa: Information Canada, 1973) (hereafter *Green Paper*).

[68] *Ibid.* at 7.

[69] *Ibid.* at 30. For a discussion of telecommunications regulation in the United States, see M.R. Irwin, *The Telecommunications Industry, Integration vs. Competition* (New York: Praeger, 1971); and A. Kahn, *The Economics of Regulation: Principles and Institutions* (New York: Wiley, 1971), Volume 2, Ch. 4.

[70] Minister of Communications, *Communications: Some Federal Proposals* (Ottawa: Information Canada, 1975) (hereafter *Grey Paper*).

[71] *Ibid.* at 4.

[72] See, for example, statement delivered by the Hon. John R. Rhodes, Ontario Minister of Transportation and Communications, at the Federal-Provincial Conference on Communications, 13–14 May 1975, Doc. No. 830–6/006.

See also the statement by the Hon. Gérard Pelletier, Federal Minister of Communications, delivered at the next Federal-Provincial Conference on Communications, 15–16 July 1975, Doc. No. 830–11/007.

[73] Canada–Manitoba Agreement, 10 November 1976. See CRTC Public Notice, 30 December 1976, Appendix 'B'.

[74] Three separate but essentially similar bills were in fact introduced into three successive sessions of Parliament with a view to bringing into effect the second phase of the new telecommunications legislation. Bill C-43, introduced on 22 March 1977, died on the Order Paper, as did its successors, Bill C-24, introduced on 26 January 1978, and Bill C-16, introduced on 9 November 1978.

[75] Press release by the Hon. Jeanne Sauvé, Minister of Communications, 13 February 1979, attaching "Draft for Discussion."

[76] Canadian Radio-television and Telecommunications Commission, *The 1980s: A Decade of Diversity — Broadcasting, Satellites and Pay TV* — Report of the Committee on Extension of Service to Northern and Remote Communities, 1980.

[77] See Appendix C in this volume.

[78] See Appendix D in this volume.

[79] Concurrent jurisdiction exists in situations in which legislative or regulatory authority regarding the same subject matter is shared by two or more levels of government. Concurrent, but paramount jurisdiction is said to exist when the legislation of one level of government prevails to the extent of any conflict that may exist with the concurrent legislation of the other level of government regarding the same subject matter.

[80] *Supra*, note 23.

[81] Federal-Provincial Conference of First Ministers on the Constitution, Ottawa, 8–12 September 1980, *Verbatim Transcript*, Volume I, at 1154. (See also Appendix E in this volume.)

[82] *Supra*, note 10 at 139.

[83] CRTC Public Announcement, *Inquiry into Telecommunications Carriers, Costing and Accounting Procedures*, 7 September 1976.

[84] *Ibid.* at 11–13.

[85] See Appendix B in this volume.

[86] *CNCP Telecommunications: Interconnection with Bell Canada*, Telecom. Decision CRTC 79-11, 17 May 1979.

[87] "Cream skimming" refers to the practice whereby entrants in a regulated market choose to challenge the incumbent firm only on profitable services and/or routes. The less-profitable services, whose rates are typically cross-subsidized by the "cream" services, must still be offered by the incumbent firm as part of its public utility mandate. Thus, absent the burden of maintaining those services, the competitor is able to skim the cream on the lucrative markets thereby precluding the incumbent firm from pursuing an effective policy of internal cross-subsidization.

[88] *Supra*, notes 5 and 6.

[89] See Appendix C in this volume.

[90] It is assumed that interprovincial rate setting and approval would be based on costs of service as opposed to value of service. If the value-of-service approach were adopted for such services, the need for a rigorous system of cost separations would not be as apparent.

[91] Alberta Public Utilities Board, Telecommunications Inquiry, Report No. E80111, 1 September 1980 at 130.

[92] See Western Premiers' Task Force on Constitutional Trends, *First Report* (1974), *Second Report* (1978).

[93] See J. Madden, *Videotex in Canada* (Ottawa: Department of Communications, 1979) at 3 for a definition of "teletext."

[94] *MCI Telecommunications Corp.* v. *F.C.C.*, 561 F. 2d 365, (D.C. Cir. 1977).

[95] M. R. Irwin, "Technology and Telecommunication: A Policy Perspective for the 80's," Regulation Reference Working Paper No. 22 (Ottawa: Economic Council of Canada, 1981).

[96] M. Fuss and L. Waverman, *The Regulation of Telecommunications in Canada*, Regulation Reference Technical Report No. 7 (Ottawa: Economic Council of Canada, 1981).

[97] Memorandum of Evidence, 14 March 1980, filed by CNCP Telecommunications, in the TCTS Rate Hearing, at 46.

[98] *Ibid.* at 58.

[99] *Supra*, note 10 at 91.

[100] *Ibid.* at 139-40.

[101] *Communications Act*, 47 U.S.C., s. 410(c).

[102] *City of Prince Rupert Connecting Agreement with B.C. Telephone Company*, Telecom. Decision CRTC 79-21, 9 November 1979, 5 C.R.T. 666, at 667.

[103] CRTC Public Notice, *Bell Canada and B.C. Telephone Company, Increase in Trans-Canada Telephone System Rates*, 4 August 1978, at 10.

[104] *Supra*, note 74. The statutory declaration of a telecommunications policy for Canada contained the following policy objectives:

s. 3(a) efficient telecommunication systems are essential to the sovereignty and integrity of Canada, and telecommunication services and production resources should be developed and administered so as to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada; . . .

s. 3(c) all Canadians are entitled, subject to technological and economic limitations, to reliable telecommunication services making the best use of all available modes, resources and facilities, taking into account regional and provincial needs and priorities;

s. 3(d) telecommunication links within and among all parts of Canada should be strengthened, and Canadian facilities should be used to the greatest extent feasible for the carriage of telecommunications within Canada and between Canada and other countries;

[105] *National Transportation Act*, R.S.C. 1970, c. N–17.

[106] The CRTC does not have the same power of review of its own decisions relating to broadcasting matters.

[107] *Bell Canada, Request to Review that part of Telecom Decision CRTC 78–7 of August 10, 1978 dealing with the Saudi Arabian Telephone Project*, Telecom. Decision CRTC 79–1, 2 February 1979; 4 C.R.T. 619.

[108] Such a right of appeal may be conferred by the enabling legislation or, absent an explicit right, recourse may be had to the right to judicial review embodied in section 28 of the *Federal Court Act*, R.S.C. 1970, 2nd Supp., c. 10.

[109] *Federal Court Act*, section 18. The prerogative remedies comprise certiorari, prohibition, mandamus, and habeas corpus. As between *certiorari* and *prohibition*, the major difference between these two remedies lies in the timing of the applications. *Certiorari* serves to quash a decision already taken, whereas *prohibition* is only available so long as there remains something for the statutory decision maker still to do which can be restrained by the issue of the writ. The prerogative writ of *mandamus* is used to compel statutory authorities to perform their public duties, i.e., to exercise their statutory discretion. *Habeas corpus* is not commonly used for purposes of judicial review, since few administrative agencies possess powers to order the detention of private individuals, and a prerequisite for the issue of the writ is that it be sought in respect of a person who is actually being detained or is in custody.

[110] *Attorney General of Canada* v. *Inuit Tapirisat of Canada* (1981), 115 D.L.R. (3d) 1 (S.C.C.).

[111] Royal Commission on Financial Management and Accountability (Lambert Commission), *Final Report* (Ottawa: Minister of Supply and Services Canada, 1979) at 319; Law Reform Commission of Canada, *Independent Administrative Agencies*, Working Paper No. 25 (Ottawa: Minister of Supply and Services Canada, 1980) at 88.

[112] Law Reform Commission of Canada, *supra*, note 111 at 87.

[113] *Ibid.* at 317–18. See also Economic Council of Canada, *Responsible Regulation*, Interim Report (Ottawa: Minister of Supply and Services Canada, 1979); H. Janisch, "Political Accountability for Administrative Tribunals," paper presented at the Conference on Administrative Justice, University of Ottawa, 27 January 1978, reproduced in a collection of unedited conference papers and comments by the Canadian Institute for the Administration of Justice.

[114] Bill C–16, section 9(2), *supra*, note 74.

[115] *Re. Constitutional Questions Act*, 28 September 1981, Supreme Court of Canada, [1981] 1 S.C.R. 753.

Part IV

The Implications of the Federal and Provincial Proposals for Regulating Telecommunications: An Economist's Perspective

Barry Lesser

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> If trade is the life blood of an economy, then telecommunications can truly be regarded as the nervous system of both the economy and society.[1]

Introduction

An efficient, technologically advanced telecommunications system is a necessary ingredient for the efficient operation and growth of a developed, industrialized nation. Especially in a country such as Canada where geographic size and the pattern of population distribution greatly increase the need for a means of quick, efficient communications, the telecommunications network takes on an even greater importance. In the remaining decades of this century, the impact of new telecommunications technology, most particularly technology that involves computer-communications combinations, is likely to make Canada's telecommunications system even more important to the economy than has historically been the case.

Given the importance of telecommunications to the Canadian economy, an equally important question becomes that of how government regulates telecommunications. This does not presuppose particular policy conclusions on the part of government. Rather it makes the general point that the actions the government takes will have wide-ranging implications for the conduct, structure, and performance of the telecommunications industry and, given the importance of telecommunications to the economy at large, for the conduct, structure, and performance of the economy as a whole.

The object of this paper is to offer an economic analysis of the current constitutional proposals of both the federal government and the provinces for assignment of jurisdiction over telecommunications, and to consider possible alternative scenarios or assignments. The issue of constitutional jurisdiction over telecommunications is of major importance. Which level of government has jurisdiction over communications could have profound implications for the way in which telecommunications is regulated and, hence, the way in which the sector develops and the implications of this for the economy at large. Canadians must be concerned to know the economic implications of the proposals that have been made by the federal government and the provinces and to know what some of the other options might be.

Defining Telecommunications

The communications sector is generally regarded as being made up of two subsectors: telecommunications and broadcasting. While both of these subsectors are involved in the constitutional proposals regarding the assignment of jurisdiction over communications, only telecom-

munications is of concern to us here. It is important, therefore, that we have a precise definition of telecommunications and of the dividing line between telecommunications and broadcasting. Babe[2] defines telecommunications and broadcasting as

> common carrier activity based on the electronic *delivery* of point to point messages over a distance. Broadcasting, on the other hand, is in the first instance concerned with *message creation* and only secondarily with message delivery; in addition, the message is received by many and so is not point to point communications.[3]

Two distinctions between telecommunications and broadcasting are emphasized by this definition. First, the telecommunications industry is concerned with message delivery, that is, it is a message transmission system, while the broadcasting industry is concerned, in the first instance, with message creation. Secondly, telecommunications is point to point while broadcasting is not. The first distinction, while historically valid, is one which new technology may cause to become more blurred. Videotex systems,[4] for example, will have an important component of message creation that may not, however, be easily separable from the transmission component of the system. Other issues such as the privacy of data banks, security of data flows, and transborder data flows may also lead to increasing concern with the message content of telecommunications in the future.

The second distinction, the point-to-point characteristic of telecommunications, is more important. The phrase "point to point" should be taken to include multi-point telecommunications (e.g., teleconferencing). "Point to point" thus refers to the ability to designate the parties included in the communications transaction and to exclude all others. This "closed" nature of telecommunications is then in contrast to the "off-the-air" reception of broadcasting, which does not allow discriminate exclusion so long as one remains within the range of the broadcast signal.[5]

A further important distinction between telecommunications and broadcasting not noted in Babe's definition is that telecommunications is, subject only to the particular terminal attachments used, a two-way interactive electronic communications system, while broadcasting is a one-way system.

Given this discussion, the definition of telecommunications that we will use is the following:

> Telecommunications is an electronic, two-way communications system, involving point-to-point message delivery, over a distance.

As will be obvious, this definition encompasses all electronic communications systems other than over-the-air broadcasting. Common carrier telephone systems, private line or dedicated telephone

systems, CATV, and videotex systems are all included in telecommunications using this definition. While the discussion that follows will not typically examine these components separately, the reader should bear in mind all that is included in the definition being used.

This definition is not fully in accord with the definitions of telecommunications and broadcasting as these terms are often conventionally used. In particular, cable is usually included in the definition of broadcasting, and, indeed, the federal government has historically regulated cable undertakings as an extension of broadcast services.[6] Two-way cable, however, falls within the definition of telecommunications adopted here. While existing cable networks operate as one-way systems, there is, however, technologically no impediment to utilizing cable systems for two-way interactive communications, and, indeed, the cable industry is very interested in providing a variety of new services that would be two-way, such as videotex. The definitions used here do accord with the formal language used in both the federal and provincial proposals under consideration.

The Telecommunications Industry in Canada

Already in this paper, reference has been made to the importance of telecommunications in Canada. While this argument has a number of dimensions, it may, nonetheless, be instructive to comment briefly on some of the characteristics of the telecommunications industry as one means of gaining some perspective on the industry's importance.

Table 1 sets out a number of characteristics of the ten largest telephone companies in Canada and the three national telecommunications carriers. As is obvious, the industry is characterized by considerable diversity of ownership and jurisdiction. The degree of government participation in the ownership of the industry is particularly noteworthy, with federal involvement in the three national telecommunications carriers and provincial or municipal ownership of four of the top ten telephone companies.

The value of plant assets and/or total revenue figures places most of the carriers shown in Table 1 among the major corporations in Canada.[7] The figures on total operating expenditures show the importance of the industry to other segments of the Canadian economy, either in the form of purchases from suppliers (which produce further secondary multiplier effects) or wages and salaries (which also produce further secondary multiplier effects).

Table 2 summarizes similar information for cable operators as a group. As can be seen, cable operators, collectively, also represent a very significant industry in terms of asset value and operating revenue and as a source of expenditure in the economy. Because of the large number of cable operators and the limited franchise areas within which cable companies typically operate, a more detailed breakdown

Table 1
SELECTED CHARACTERISTICS OF MAJOR TELEPHONE COMPANIES AND NATIONAL TELECOMMUNICATIONS CARRIERS, 1979

Company	Ownership	Jurisdiction	Total Operating Revenue (000's $)	Value of Plant (Less depreciation) (000's $)*	Total Operating Expenditures (000's $)*
Bell Canada	Shareholder	federal	2,817,108	6,189,008	1,784,497
British Columbia Telephone	Shareholder	federal	688,138	1,641,806	393,435
Alberta Government Telephone	Alberta Government	provincial	529,020	1,258,171	338,838
Manitoba Telephone System	Manitoba Government	provincial	192,172	432,913	113,240
Saskatchewan Telecommunications	Saskatchewan Government	provincial	196,800	472,141	117,242
Maritime Telegraph and Telephone	Shareholder	provincial	166,924	367,434	99,563
New Brunswick Telephone	Shareholder	provincial	139,299	293,112	83,668
Quebec Telephone	Shareholder	provincial	101,303	251,713	56,761
Edmonton Telephone	City of Edmonton	provincial	96,267	235,844	57,793
Newfoundland Telephone	Shareholder	provincial	79,057	170,997	44,360
CNCP Telecommunications	Federal Government/ Shareholder	federal	244,460	422,395	194,556
Teleglobe Canada	Federal Government	federal	110,370	123,783	45,192
Telesat Canada	Federal Government/ Other Telecom. Carriers	federal	49,842	147,043	26,680

Sources: Economic Council of Canada, *Reforming Regulation* (Ottawa: Minister of Supply and Services Canada, 1981), p. 38; CRTC, *Annual Report, 1979–80* (Ottawa: Minister of Supply and Services Canada, 1980), pp. 14–17.
Note: * Columns marked with an asterisk (*) show 1978 figures.

Table 2
SELECTED CHARACTERISTICS OF THE CANADIAN CABLEVISION INDUSTRY, 1979

Operating Systems	482
Ownership	private
Jurisdiction	federal
Total Operating Revenue (000's $)	313,747
Total Operating Expenses (000's $)	264,169
Net Fixed Assets (000's $) (Companies with more than 100 subscribers)	348,863

Source: Statistics Canada, *Cable Television, 1979*, Cat. No. 56-205 (Ottawa: Minister of Industry, Trade and Commerce, 1980).

by individual firms is not feasible. It is noteworthy, however, that there has been a significant increase in the concentration in the cable industry over the past decade. Rogers Cable systems, in particular, now holds a very large share of the market.

The Federal Proposal

The primary sources for the federal government's proposal on telecommunications and the Constitution that are used in this paper are a set of notes for an address delivered in September 1980 by Mr. Jean Fournier, senior assistant deputy minister in the federal Department of Communications (see Appendix F) and a set of notes for a statement by the Prime Minister, again from September 1980 (see Appendix E).[8]

The Fournier address outlines the federal proposal as follows:

1. The major guiding principle is that all interprovincial and international aspects of telecommunications be subject to the exclusive jurisdiction of the federal government; strictly intraprovincial aspects would be left to the provinces to regulate.

2. Under this principle, the federal government would have exclusive jurisdiction over national carriers, space and satellite carriers, broadcasting, and the frequency spectrum.

3. Under this principle, the provinces would have jurisdiction over the services and rates of telephone companies for services within provincial boundaries subject to the establishment of a *joint* regulatory board to supervise and regulate interprovincial rates and services. The provinces would also have exclusive jurisdiction over cable operations within their boundaries subject to federal jurisdiction over distribution of a national programme package, non-Canadian programming, technical standards, and the carriage of messages "for a federal purpose."

The Prime Minister's statement essentially duplicates the main points of the Fournier statement but does provide some slightly

greater detail regarding meaning or interpretation. "National carriers" are defined to encompass Telesat, Teleglobe, and CNCP Telecommunications. Cable undertakings that serve subscribers in more than one province would remain under federal authority. Federal responsibility relating to space and satellite carriers is noted explicitly to encompass "related stations on the ground."

On a potentially contradictory note (in relation to Fournier's address), the Prime Minister's statement indicates that "The Government of Canada would retain authority over matters of national interest like interprovincial and international rates and services."[9]

Fournier's speech, by contrast, while emphasizing the interprovincial and intraprovincial principle, notes that interprovincial rates and services are to be regulated by a "joint regulatory board."[10] In other words, while the Prime Minister speaks of exclusive federal jurisdiction over interprovincial rates and services, Fournier appears to be speaking of some form of concurrent regulation embodied in a joint federal-provincial regulatory board.

This seeming contradiction is, however, resolved if we examine the federal statement that outlines in detail the federal proposal for the joint regulatory board. (This statement is included in Appendix C.)

The regulatory board in question is to be a creation of the federal government (i.e., is to be created by federal legislation). It would be comprised of eleven members, six of whom are federal appointments and five of whom are provincial appointments. While decisions of the board would be binding on all parties, appeals would be possible. Such appeals, however, would be governed by "existing federal legislation," meaning that appeals could be made to the federal Court of Appeal or the Governor in Council, that is, the federal Cabinet. In other words, the "joint" regulatory board would, in fact, be a federal regulatory board, created by the federal government, having a majority of federally appointed members and with the federal government ultimately having final authority through the appeal process. The sole direct involvement of the provinces would be in the appointment of some of the commissioners, which in itself falls far short of concurrent regulation of interprovincial telecommunications rates and services.

The Provinces' Proposal

The statement of the provinces' proposal on telecommunications and the Constitution used in this paper is based on the document labelled "Best Efforts Draft" (see Appendix D) and on a summary of the federal government's interpretation of the provincial proposal contained in the Prime Minister's statement (Appendix E).

Basically, the provinces' proposal assigns to the provinces exclusive jurisdiction over telecommunications undertakings within provincial boundaries, *including international and interprovincial services*

originating or received in the province. The federal government is provided a concurrent jurisdiction in interprovincial and international undertakings. Provincial laws, however, take precedence over federal with the exception of wholly technical aspects of management of the frequency spectrum, the space segment of satellite communications, broadcasting undertakings involving at least four provinces (including the redistribution of such broadcast signals), and the use of telecommunications for purposes of aviation, shipping, defence, or national emergencies. While provinces are enjoined against enacting legislation that would disrupt the free flow of information, when the laws of two or more provinces have this effect, the resolution of the matter depends on one of the provinces involved petitioning the federal Parliament to "enact a law to resolve the specific conflict and such law shall prevail."[11]

The summary of the provinces' position contained in the Prime Minister's statement corresponds to the above characterization of the provinces' own statement in its essential features, but does tend to exaggerate the provinces' position somewhat.

First, the Prime Minister's statement fails to note that the federal government is, in fact, given concurrent jurisdiction regarding all telecommunications works and undertakings except those "wholly situated within a province."[12] Given that provincial laws would be paramount, this concurrent jurisdiction may be simply window dressing; on the other hand, in many sub-areas, various provincial governments might prove quite prepared to accept federal statutes or policy positions or to resolve policy differences through negotiation with the federal government. Secondly, the Prime Minister claims that federal responsibility in the conventional broadcast area would be limited to the CBC and, to a degree, to the commercial use of off-the-air American television programming, while all cable operations would fall into provincial hands. But clause 4(c) of the provinces' statement encompasses all national broadcasting, not just the CBC (so long as at least four provinces are involved), and includes the redistribution of such undertakings, thereby including cable distribution. In this case, federal statutes would be paramount. Similarly, under clause 4(d), federal laws regarding foreign broadcast signals (including their redistribution, i.e., including cable operators) again take precedence over provincial statutes.

Because the provinces' statement is so brief, offering no explanation or rationale for the proposal advanced, it is difficult to say that the Prime Minister's interpretation of the provinces' position is a misrepresentation. In a number of important respects, however, his characterization of the provinces' position appears to come close to this.

Summary of Similarities and Differences

Given the federal and provincial positions that have been respectively outlined in the two preceding sections, what are the substantive similarities and differences in the two proposals?

Both proposals give the provinces exclusive jurisdiction over common carrier operations that are carried out wholly within the boundaries of individual provinces.

Both proposals give the provinces exclusive jurisdiction over cable operations wholly within a province in regards to franchise areas, licensing, rates, and non-broadcast services, so long as the latter are wholly intraprovincial.

Both proposals give the federal government either exclusive or paramount jurisdiction over national programming including the carrying of such programming by cable operators (although the respective definitions of national programming may differ).

Both proposals give the federal government either exclusive or paramount jurisdiction over foreign broadcast signals, including their redistribution by cable.

Both proposals give the federal government either exclusive or paramount jurisdiction over the space segment of communications satellites and the technical aspects of managing the radio frequency spectrum.

The two proposals then have much in common. They do, however, quite obviously differ in a number of important respects.

The federal proposal assigns exclusive responsibility for interprovincial and international rates and services of the telephone companies to the federal government (with *some* provincial input via the proposed joint regulatory board), while the provinces' proposal assigns concurrent jurisdiction with provincial laws paramount except in the areas previously noted.

The federal proposal assigns exclusive responsibility for national carriers to the federal government, while the provinces' proposal again makes this a concurrent jurisdiction with provincial paramountcy.

The federal proposal gives the federal government exclusive jurisdiction over all aspects of satellite communications including earth stations, whereas the provinces' proposal assigns concurrent jurisdiction for earth stations with provincial paramountcy.

The federal proposal gives the federal government exclusive jurisdiction over cable operations serving subscribers in more than one province, while the provinces propose concurrent jurisdiction and provincial paramountcy.

Finally, the federal proposal gives the federal government exclusive jurisdiction over all conventional broadcasting undertakings, while the provinces propose concurrent jurisdiction with provincial paramountcy except for technical aspects of managing the frequency spectrum.

A Framework for Analysis

In order to judge, from an economist's perspective, the relative merits of the federal and provincial proposals, the first question to be put is, "By what economic criteria can one determine to which level of government, federal or provincial, should a particular function or power be constitutionally assigned?" It is when this question has been answered that the respective proposals at hand can be analysed and compared, both with one another and with other possible alternatives.

To answer this question, we will first construct a framework for analysis, using a model(s) as set out by Breton and Scott in their book, *The Economic Constitution of Federal States*.[13] The Breton/Scott approach is concerned, as we are here,

> . . . to be able to explain why it is that the governments located at one particular jurisdictional level — the provincial level or the local level, for example — have the authority to make laws, to regulate, or to spend money on certain activities and not on others.[14]

Moreover, the Breton/Scott model(s) deals with the question of reassigning constitutional powers, which is, of course, the question under consideration here for the case of telecommunications jurisdiction.

The approach taken by Breton/Scott is based on the recognition that the public-sector structure that a country adopts will involve various "resource-using organizational activities"[15] or organizational costs and that any reassignment of powers will alter these costs. This approach does not start out by categorizing areas as local, provincial, or national in scope and prescribe an assignment of jurisdiction on this basis. Rather it asserts that the goal to be achieved in the design of a federal structure is to keep the level of organizational costs as low as possible. Jurisdictional assignment of constitutional functions is then decided by this criterion. All policies and activities of government are viewed as being characterized by externalities and economies of scale, that is, they are viewed as being interdependent. Actions taken in one jurisdiction, in other words, will affect and be affected by other jurisdictions. The extent of this interdependence will influence the level of organizational costs associated with different assignments. The preferred assignment will be based on keeping organizational costs as low as possible.

Four types or categories of organizational costs are identified:

1. Administrative costs — the costs at each level of government of setting up and maintaining that government's institutions
2. Co-ordination costs — the costs attached to the task of co-ordinating activities between governments

3. Signalling costs — the costs associated with citizens' activities aimed at making governments more aware of their preferences so as to obtain a public policy bundle that comes closer to the bundle they desire

4. Mobility costs — the costs associated with citizens moving from one jurisdiction to another, again in order to obtain a public policy bundle that is closer to the bundle they desire.

A distinction is drawn by Breton/Scott between functions and policies. Functions refer to the power or responsibility, assigned by the constitution, that enables a given level of government to act in a particular area. Policies, on the other hand, refer to the actions or activities that a given level of government undertakes (including no action) in a particular area, given that it has the constitutional authority to do so, that is, given that the area has been assigned to that level of government as one of its functions.

This distinction between functions and policies is an important one for our purposes because what we are primarily concerned with is what level of government should have the authority to regulate telecommunications, or parts thereof. We are not primarily concerned with what policies should be implemented. The "ideal" policies are, in fact, at least theoretically, independent of which level of government has the authority to impose them. Furthermore, whatever level of government is assigned the regulatory function for telecommunications, there is, by virtue of that assignment alone, absolutely no guarantee that the ideal policies will be adopted. We will, at a later point, discuss some explicit policy issues and explore the possible implications, if any, that they may have for the assignment of the regulatory jurisdiction, and vice versa; but, for the moment, we repeat that the first and primary question to be analysed is which level of government should receive the authority to act.

The interdependence, which Breton/Scott argue holds for all functions, clearly holds for telecommunications. Telecommunications, as a two-way interactive electronic communications system, is characterized by strong externalities.[16] When the telecommunications network transcends provincial or national boundaries, these externalities cross the jurisdictional boundaries of provinces in the case of both interprovincial and international telecommunications and of the country in the case of international telecommunications. It is virtually impossible to characterize one part of the telecommunications network as local and another as national. Not only are the parts of the network interconnected and hence interdependent, but, most often, the same equipment is involved in providing both types of service.

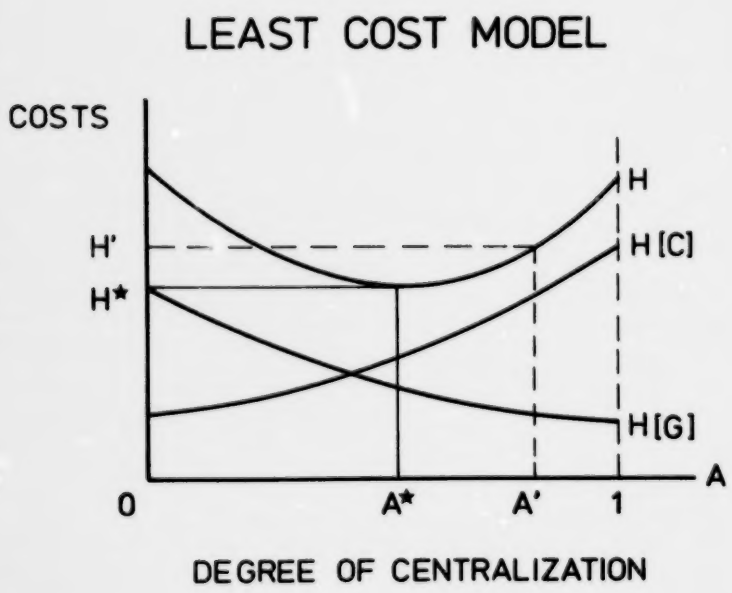
The assignment of functions to various levels of government is carried out in the Breton/Scott framework by the so-called "con-

stituent assembly." It is assumed that as the degree of centralization embedded in the function assignment increases, signalling costs fall, mobility costs, on balance, rise (although it is possible that they could, on balance, fall), co-ordination costs fall, and administration costs, on balance, stay the same (although it is possible that they could, on balance, rise or fall).[17] Different assignments will produce different total costs and different degrees of centralization.

Under the least-cost formulation of the Breton/Scott model, the constituent assembly acts so as to minimize the total resources committed to organizational activities of citizens and of governments. In other words, the constituent assembly acts so as to minimize the total of signalling and mobility costs (citizen organization costs) and administration and co-ordination costs (government organization costs).

Figure 1 illustrates this least-cost model. Under a set of stability conditions that are imposed on the model,[18] citizen organizational costs (H[C]), government organizational costs (H[G]), and total organizational costs (H = H[C] + H[G]) will vary with the degree of centralization (A, which = 0 under complete decentralization and 1 under complete centralization) as shown in Figure 1.[19]

Figure 1



The least-cost equilibrium will then be given by A*. The constituent assembly will choose an assignment that gives rise to A*[20] so long as it is costless to move to A*. If, however, there is an initial assignment that places the society at A^1, and if the costs associated with reassigning functions so as to move to A* are greater than the resource savings made possible by this move ($= H^1 - H^*$), then the constituent assembly will not choose to move to A*. Potentially, any change in any of the organizational costs as a result of such factors as changing interest rates, life expectancy, government policies, or the technology of producing private or public goods[21] could produce a change in the least-cost assignment and hence a change in the degree of centralization.

In the least-cost model, the constituent assembly or, more correctly, its members are assumed to have no "preferences of their own for particular assignments."[22] In a second version of the model, called the "representative democracy" model, this assumption is relaxed to allow members of the assembly to have their own preferences for possible assignments. When this situation occurs, the function assignment chosen will lead to higher total organizational costs than would be the case under the least-cost model, unless, by coincidence, the least-cost assignment happens to be the assignment preferred by the assembly.

Two cases are analysed in the "representative democracy" model: (1) the case of a uni-level constituent assembly, that is, an assembly made up of politicians who are all drawn from one level of government, and (2) the case of a multi-level constituent assembly, that is, an assembly made up of elected representatives drawn from two or more levels of government. Each of these cases is further distinguished by introducing bureaucrats who themselves have positive preferences concerning the function assignment.

Because the problem of the assignment or reassignment of the telecommunications function that is before us must be a decision of both federal and provincial representatives, we will only examine the multi-level assembly case here.

The representative government, multi-level assembly model has, for the two levels of government case (the current Canadian form of which would be a First Ministers' Conference), four groups or parties who are involved in the assembly: politicians from the two levels of government and bureaucrats from the two levels of government. All parties seek, in the assignment process, to maximize their own self-interest, that is, their own utility. For politicians, their self-interest is defined in terms of staying in office, that is, gaining re-election, and "some other variables such as honour, statesmanship, place in history, and private wealth."[23] Politicians in this framework will not always pursue those policies or that assignment which appeals to the greatest number of citizens. For example, a governing party with a clear

legislative majority and early in its term (relatively distant from a new election) will have more degrees of freedom, that is, it will be able, with greater impunity, to pursue its own personal preferences regardless of whether these correspond to the preferences of citizens.

Bureaucrats' self-interest is defined in terms of the power they hold, as defined by some variable such as the size of their department or agency or the size of the budget allotment of their department or agency. Each bureaucrat then seeks an assignment that, *certeris paribus*, makes his/her power as large as possible.

Clearly, the relative strengths of the various participants will determine to a large extent the assignment of functions chosen by the constituent assembly. But within this general characterization, two factors contribute to some predictability of results.

First, it is assumed that bureaucrats, who are technically subordinate to the politicians and hence technically do not have the power to enforce their preferences, may nonetheless gain their preferred assignment if either their preferences are not relatively distant from those of the politicians or, especially when politicians have excess degrees of freedom, the politicians decide to keep their bureaucrats happy. As a general proposition, bureaucrats at a particular level of government will favour being assigned those functions for which expenditure on administration is larger when the function is at their level than expenditure on co-ordination when the function is not at their level and vice versa. In general, this means that bureaucrats at both levels will favour, on balance, increased centralization.

Secondly, it is assumed that the members of the constituent assembly in multi-level assemblies are prepared to trade, one level with the other. In this case, functions will be "sold, loaned, rented, or subdivided."[24] The objective of such trades is to improve the utility (the chances for re-election) of politicians at both levels and the utility (the degree of power) of bureaucrats at both levels.

Under these conditions, a constituent assembly (assuming "that the more productive tax bases have been assigned to the federal jurisdictional level," which thus is the "buyer" in the trading process[25]) will engage in trades which move the assignment of functions away from the least-cost assignment, that is, which impose excess organizational costs on society and, on balance, reduce support for governments, if:

1. Politicians have excess degrees of freedom and choose to spend some of them to satisfy a preference for more centralization
2. Politicians have excess degrees of freedom and choose to spend some of them to achieve other objectives such as appeasing their bureaucrats or making a reputation as statesmen, even though they have themselves no preference for more centralization

3. Politicians seek to obtain by such trades more degrees of freedom. (For example, when a function is transferred to a higher level of government, junior governments not having to make any policy decisions with respect to that function may gain the support of some citizens who would otherwise have opposed them.)[26]

If trades occur for any of these reasons, given the assumption that the senior level of government has the more productive tax base and hence is the "buyer" in the trading process, then a greater degree of centralization would occur as the result of the trades that take place. When the more productive tax base has been initially assigned to the junior level of government, the above analysis would hold in reverse.

The Assignment of the Telecommunications Function

The framework of analysis developed in the preceding section puts us in a position to analyse the proposals of the federal government and of the provinces regarding the constitutional assignment of the telecommunications function and to formulate alternative possible proposals for consideration.

The Breton/Scott framework, as outlined, is clearly quite abstract. The description of the framework has been relatively lengthy precisely because the model is so abstract and, hence, somewhat difficult to appreciate. In the discussion that follows, we will be concerned to use the model in a very concrete fashion to analyse the problem of assigning the telecommunications function.

The Breton/Scott model is not without problems.[27] In particular, the assumption or premise that day-to-day policies can be divorced from the assignment of constitutional functions and that, therefore, the latter may be decided independently of the substance of day-to-day policy matters may be somewhat artificial, not reflecting the actual day-to-day workings of governments. Hence, a later section of this paper will examine the possible interdependence between policies and the assignment of functions.

One of the major problems with using the Breton/Scott model here is, however, not due to a deficiency in the model itself. Rather it is a result of attempting to apply the model to the assignment of a single power, without putting that power in the context of the total constitutional package being negotiated. In other words, the assignment proposal for telecommunications of either the federal government or the provinces or both will not be independent of the assignment of other powers simultaneously under discussion or, indeed, of previous constitutional bargains. There are, in fact, two aspects to this issue. First, certain functions or powers may be complementary such that they should be assigned to the same jurisdictional level, if possible. In the telecommunications case, two

possible examples of such functional complementarity would be the money and banking function (which in the context of electronic banking becomes complementary to the telecommunications function) and postal service (which in the context of electronic mail becomes complementary to the telecommunications function). This issue of complementary functions we will return to discuss in more detail at a later point. Secondly, there may be mutually beneficial trades in functions that the members of the constituent assembly would be prepared to make, the opportunity for which does not arise when functions are treated in isolation. For example, it has been speculated that had the provinces been prepared to support the federal government's "Bill of Rights Amendment" at the September 1980 constitutional conference, the federal government would have been prepared to concede virtually complete provincial jurisdiction over the telecommunications function. Whether this is true is not relevant. As a possibility, it serves our purpose here of providing an example of the type of trade in the assignment of powers that could take place and that could quite easily influence the assignment of a particular function such as telecommunications. Such trading opportunities do not arise, however, when the assignment of functions is examined on an individual basis. This will be of most concern in the context of the representative democracy, multi-level assembly model. It may, however, also be of concern in the least-cost version of the model, where it is possible that the least-cost assignment overall will not necessarily minimize the organizational costs attached to or arising from each individual function versus minimizing the cost of the "bundle" of functions assigned to each jurisdictional level. This situation could arise on account of (*a*) the type of complementarity of functions noted above, (*b*) interfunctional economies in administrative or coordination costs (analogous to economies of scope), or (*c*) interfunctional economies in signalling or mobility costs. We will proceed, however, on the assumption that the least-cost assignment of functions taken individually determines or leads to overall cost minimization. On this basis, we will examine the relative level of organizational costs of each jurisdictional level in order to identify the least-cost solution. This will, in turn, provide a bench-mark against which to judge the respective proposals of the federal government and the provinces.

1. Administrative costs, following Breton/Scott, will be assumed to be the same overall when either level of government assumes complete jurisdiction for the telecommunications function. When the assignment is to provincial governments, there will be more administrative units, each operating on a smaller scale, and hence an increase in administrative costs over the case of federal assignment, if we assume some economies of scale with centralization. On the other hand, a

federal assignment of jurisdiction will increase the administrative costs associated with discovering the preferences of citizens. This argument is analogous to one dimension of the case often made for greater decentralization (the other dimension of which is mirrored in citizens' signalling costs), namely that the more decentralized is the assignment of functions, *ceteris paribus*, the more likely government is to be aware of, and to respond to, citizens' preferences. On balance, these two opposing trends in administrative costs could produce the same, higher, or lower total administration costs as the jurisdictional assignment varies. It is not likely, however, that the economies of scale resulting from a federal assignment of the telecommunications function would be relatively great, given the multiplicity of service providers that exist and that are taken as given.[28] Therefore, on balance, it is assumed that total administrative costs will show little variation as the level of assignment varies and, therefore, can be treated as though they were constant.

This result, which applies to the case where one level of government or the other acquires complete jurisdiction over all aspects of telecommunications, does not, however, necessarily hold when there is concurrent jurisdiction with either exclusivity or paramountcy of one level with respect to various subdivisions of the telecommunications function. When the function is subdivided so that each level of government acquires jurisdiction over one or more aspects of the function, there will be more jurisdictional units involved than under complete assignment to either level, with each unit operating on a smaller scale than under respective complete assignment to either level. Thus there is little basis for assuming overall economies of scale, almost regardless of the proportion of jurisdiction that goes to the federal level. Indeed, it is a real possibility that some diseconomies of small scale will be incurred greater than those experienced with complete provincial jurisdiction, especially if jurisdiction over the common carriers is divided such that the carriers become responsible to both levels. At the same time, the search costs of government will increase as before, in so far as the federal government necessarily has some jurisdiction under this option. Thus, on balance, administrative costs will rise with concurrent jurisdiction and subdivision of the function.

2. Co-ordination costs can also be expected to exhibit different behaviour when there is concurrent jurisdiction and subdivision than when there is complete jurisdiction assigned to one level or the other.

With complete jurisdiction at one level, co-ordination costs will rise when the assignment is a provincial one and, conversely, fall when the assignment is federal. Breton/Scott argue this as the general case, but it will apply especially to the telecommunications function, because of the obvious and, quite likely large, interjurisdictional externalities

that are characteristic of telecommunications. Because the telecommunications system of each province is linked to that of each of the other provinces (either directly or indirectly) and also to the national systems of most other countries of the world, there are both interprovincial and international linkages or spillovers (spill-ins) that arise and that must be dealt with. When the assignment is to the federal level, these externality effects are internalized (to the jurisdictional level), and thus the necessity of co-ordination and hence the resources committed to co-ordination will be lower than when the assignment is a provincial one and the co-ordination must be carried out explicitly between provinces. It must be noted, however, that for certain provinces, namely the relatively least advantaged provinces, the externality effects of telecommunications might have negative implications.[29] This could be the case, in particular, as a result of new telecommunications technology, especially in the computer-telecommunications field. More will be said on this below. For the moment, the point to recognize is that, for some provinces, the optimal regulation of telecommunications under a provincial assignment might imply a smaller co-ordination effort than would be implied when only positive externalities are to be considered. Alternatively, from a federal perspective, assignment at the federal level may imply greater co-ordination effort, because of the distributional implications of telecommunications' externalities that must be traded off, than when only positive (or only negative) externalities are involved. Thus, the differential in co-ordination costs between federal and provincial assignments could be smaller than might have been expected. We will still assume, however, that co-ordination costs are lower with complete federal jurisdiction than with complete provincial jurisdiction.

When the telecommunications function is divided and jurisdiction shared, the level of co-ordination costs will again be different. Nominally, it might be argued that a shared jurisdiction, with federal exclusivity or paramountcy over all interprovincial (and international) matters, and provincial exclusivity or paramountcy over all intraprovincial matters, would provide co-ordination costs no higher than and perhaps even lower than a complete federal assignment. The difficulty with this argument, however, is that the same carriers in each province typically provide both intra- and interprovincial service. Not only are both types of service provided by the same carriers, but a great deal of the physical plant used to provide both services is also typically the same. Thus an inter/intraprovincial split of jurisdiction would lead to simultaneous regulation of the same carriers (in most cases) by both levels of government. In such a situation, co-ordination would likely increase, certainly beyond the level resulting with complete federal jurisdiction and possibly beyond the level realized with complete provincial jurisdiction. We will,

however, assume that with concurrent jurisdiction, co-ordination costs fall between the two respective extremes of complete assignment.

It is perhaps useful to remember at this point that telecommunications has been defined here to include cable television and hence all the above analysis applies equally to cable. Breton/Scott argue that cable television "generates no spill-overs"[30] and, as such, contend that, in contrast to off-the-air television, co-ordination costs of cable television will be lower, which, in turn, *ceteris paribus*, would make optimal (least-cost) an increased level of decentralization in the assignment of functions when cable technology is introduced. It is, however, debatable whether cable television generates no spillovers, even bearing in mind that relevant spillovers, in terms of the model, relate only to interjurisdictional externalities. For one thing, there are cable companies serving subscribers in more than one province. Although such cases are few and hence not of major substance, the federal government's proposal does make explicit provision for such cases. More important, however, while there may be no, or only very small, interjurisdictional spillovers regarding the delivery of cable television, there may be quite significant spillovers related to the programming channels carried. Furthermore, we are concerned here with cable operators rather than simply cable television. In other words, we are concerned with the possible carriage on cable of a variety of non-broadcast services, many of which may indeed be of an interprovincial nature, where the provision of such services by cable operators may also imply entering into competition with conventional telecommunications common carriers. Such a competitive situation, in itself, will create co-ordination costs, especially if some aspects of common carrier regulation are carried out by a different jurisdictional level than is assigned cable jurisdiction. This, of course, will necessarily be true if common carrier regulation is treated as a concurrent jurisdiction. It will also be true if cable jurisdiction is subdivided in some fashion.

3. Signalling costs by citizens are fairly straightforward; it is assumed that signalling costs will be higher with complete federal jurisdiction than with complete provincial jurisdiction. Just as the cost to government of discovering citizens' preferences will rise as the degree of centralization increases (as noted in the discussion of administrative costs), so too citizens' signalling activities will be more costly the more "distant" is the level of government they are attempting to signal.

If jurisdiction is split, however, it is not clear what will happen to citizens' signalling costs. On the one hand, we might argue that they will rise, since there are now two levels of government to whom "signals" must be provided respecting the same function. On the other hand, it may be possible for citizens to provide all their signals to one

level of government (where the provincial level would be the least-cost choice) and to rely on that level of government (via its co-ordination efforts) to pass those signals on to the other level of government (the federal level in this case). An important part of co-ordination activities will involve "signalling" between governments. In a concurrent jurisdiction case, this means that governments at each level will be "signalling" the other level already, and such signals will be strongly reinforced (on the part of the provinces especially) if the preferences of their citizens can be invoked as support for their position(s). Thus, citizens' signalling costs with some form of concurrency could be the same as for the case of complete assignment to the provincial level and, if higher, are not likely to be higher than would be the case with complete assignment at the federal level. The greater is the relative weight of the provinces in a concurrent assignment, the more likely that signalling costs will be close to, if not the same as, the level resulting from a complete provincial assignment.

4. Mobility costs in the complete single-level assignment case are also relatively straightforward; citizen mobility costs will be assumed to decrease with complete assignment at the federal level. As centralization increases, the opportunities for finding another jurisdiction with a more suitable or preferred policy bundle decrease at the same time as the cost of moving, including the cost of searching for a new location, on average, will rise. The expected yield per unit of resources expended on mobility will thus fall and hence mobility costs themselves will fall. When assignment is at the federal level, there will presumably be no policy variation between jurisdictions within Canada[31] and therefore no mobility investment involving a move *in Canada* will be possible; hence, no mobility investment will take place.

When jurisdiction is split, the impact on mobility costs is ambiguous. On the one hand, the greater degree of decentralization inherent in the provinces being assigned some part of the regulatory function implies an increased probability of policy variation between provinces and hence an increased probability of finding another jurisdiction within Canada that has a preferred policy bundle. On this basis, mobility costs might be expected to be higher than under the complete federal assignment case. On the other hand, the greater degree of uniformity (over the complete provincial assignment case) inherent in the federal government also being assigned some part of the regulatory function implies that the degree of probable policy variation between provinces will be smaller than under complete provincial assignment, in which case mobility costs may be expected to be lower than under complete provincial assignment.

All that can be said with certainty, therefore, is that the level of mobility costs in the concurrency case will be intermediate to the

levels under the respective complete assignment cases. The tendency to approach either limit will be a function of the proportional share of each level in the concurrent assignment and of the weighting by citizens of the relative importance to them of each respective sphere of responsibility. It is worth noting here that mobility costs are potentially more sensitive to the assumption of Breton/Scott regarding the separation of constitutional assignments and day-to-day policies than the other categories of organizational costs. In other words, it may ultimately be the policies themselves that determine the weighting scheme of citizens. For example, citizens in remote areas such as northern British Columbia will be very sensitive to actual policies respecting ownership and operation of satellite earth stations.

The results of the preceding discussion of organizational costs are assembled in Table 3, where, for the three possible general assignment solutions (complete federal, complete provincial, and concurrent), each of the categories of organizational costs has been ranked qualitatively, using a scale of 1 to 3, with 1 representing the least-cost alternative.

From an examination of Table 3, the following conclusions emerge:

1. A complete federal assignment is qualitatively superior to both of the other two general assignment options. Because the results are, however, purely qualitative, we cannot say, unambiguously, that a complete federal assignment would always prove superior in quantitative terms.

2. A complete federal assignment is quite likely to represent a lower-cost solution than a complete provincial assignment. This conclusion is based on the federal assignment producing the lowest costs in three categories versus the provincial assignment doing so in only two categories. (Administrative costs, recall, were assumed equal for the cases of complete assignment to either level.) While the magnitudes of difference for each cost could theoretically be such that a complete provincial assignment would still prove superior, this is unlikely.

3. A concurrent assignment is quite likely to represent a lower-cost solution than a complete provincial assignment. A concurrent assign-

Table 3
QUALITATIVE RANKING OF ORGANIZATIONAL COSTS BY JURISDICTIONAL ASSIGNMENT OPTION

	Complete Federal	Complete Provincial	Concurrent
Administrative Costs	1	1	2
Co-ordination Costs	1	3	2
Signalling Costs	3	1	2(1)
Mobility Costs	1	3	2

ment is superior to the complete provincial case in two categories and very close or the same in one other (signalling costs). It is definitely inferior in only one category. Once again, a knowledge of the magnitudes of difference in each cost category could alter this conclusion. Also, the conclusion will be weakened if the possible economies in citizens' signalling costs (i.e., the possibility that direct signalling costs to the federal level can be minimized and in the limit eliminated altogether) through using provincial representatives to co-ordination activities to convey citizens' signals regarding federal policies are not realized. The conclusion will be strengthened, however, if this assumption regarding signalling costs proves valid and/or as the degree of centralization resulting from the particular split of responsibility under the concurrency option chosen increases. In this case, *ceteris paribus*, co-ordination costs and mobility costs under the concurrent option will tend towards the federal solution level, which in both of these areas is the least-cost option.

4. A complete federal assignment is likely to be superior in overall cost terms to a concurrent assignment the more decentralized the concurrent assignment is, that is, the closer it tends to the case of complete provincial assignment. On the other hand, as the degree of centralization increases under the concurrency option, the costs in each category will tend towards the level attained with complete federal assignment. If, at the same time, federal-provincial co-ordination activities (required because of some degree of concurrency) allow us to assume some economies in citizens' signalling costs (through using provincial representatives to convey signals to the federal level), then total costs with concurrency will come even closer to the complete federal solutions and could even end up as the least-cost solution overall.

5. The degree of variation between a concurrency solution and either of the uni-level assignment solutions will clearly depend on the degree of centralization embodied in the concurrent assignment chosen. The degree of cost variation between different versions of concurency may, indeed, be greater than the degree of cost variation between a particular version of concurrency and one of the uni-level options.

6. In terms of providing ourselves with a bench-mark against which the federal and provincial proposals can be evaluated, (*a*) complete federal jurisdiction will be treated as the least-cost assignment solution and (*b*) as between different versions of the concurrency option, total organizational costs will be assumed to fall the greater the degree of centralization embodied in the particular version of concurrency being considered, that is, if two versions of concurrency are being considered, the most centralized version will be taken as the least-cost version.

The Relative Costs of the Federal and Provincial Proposals

As between the federal and provincial proposals being considered here, the federal proposal is clearly the most centralized and, as such, based on the conclusions derived from the application of the Breton/Scott framework, represents a lower-cost solution than the provinces' proposal. If the problem were as simple as calculating the respective costs of each proposal (assuming that the relevant data were available or could be determined), then as between the two proposals at hand, the federal proposal would be chosen. Overall, the least-cost principle would, in fact, lead to a choice of complete federal jurisdiction, rather than either of the two proposals at hand. The problem, however, is not this simple.

First, we are, in fact, operating in the context of the multi-level assembly, representative democracy case where account must be taken of the preferences of politicians (and bureaucrats) of both levels of government. Secondly, we must also consider the cost of effecting a reassignment of jurisdiction. If the cost of undertaking a reassignment is greater than the present value of savings produced in organizational costs after the reassignment has occurred, then, clearly, on purely economic grounds, the reassignment will not be worthwhile. Thirdly, the actual policies likely to be implemented by each level of government, if it is assigned the function, may, contrary to the Breton/Scott assumption, influence organizational costs. This point may be closely tied to the first point above, namely the influence of politicians' preferences. Fourthly, technological change in the telecommunications field may also influence organizational costs. Each of these qualifications will now be examined in turn.

The Influence of Politicians' Preferences

The proposals that have been advanced by each respective jurisdiction provide an important view of the preferences of politicians at each level. As a general proposition, the representative government model predicts that politicians of a particular level will desire the assignment of those functions or parts of functions to themselves that, *ceteris paribus*, are likely to allow policies that will enhance their political image, improve their chances for re-election, or both. Telecommunications has become very fashionable and very important as computer-communications technology has brought us to the edge of the so-called "information age" or "information society," an age that many observers feel may herald a literal revolution in our society and our way of life. In the words of the Science Council of Canada:

> Just as the introduction of electricity had profound impact on mankind, so the introduction of the new information/communica-

tions technology leads to developments that strain our powers of projection. One could, however, attempt to list the uses of the new technology and the ways in which it will transform society. Such a list would reach into almost all aspects of life, almost all industries and professions.[32]

Whether such prophecies ultimately prove true is not for our purposes important. What is important is that some people, indeed many people, believe them to be true and, more important still, politicians believe them to be true. The possibility of having primary policy-making authority, clearly defined within the Constitution, in an area that is tied to what could be the fastest growing source of employment in the country,[33] in a part of what could soon be the largest growth sector of the economy, could play a role in providing a base for Canadian technological leadership[34] and a domestic electronics/communications equipment manufacturing industry, and is a part of a change that could profoundly alter Canadian society — this possibility is indeed an attractive one.

The preceding statement is not intended to imply that traditional telephony services and cable television services are, by themselves, unimportant. It is important to realize, however, that the stakes are much higher and accordingly the preferences of politicians much stronger. To receive jurisdiction over telecommunications in the 1980s is analogous to receiving jurisdiction over railroads in the 1860s. Each in its respective time holds (held) the possibility of altering the economic and social fabric of the country.[35] Telecommunications, in addition, poses significant implications in cultural matters. Jurisdiction over telecommunications in the years ahead implies control over the principal means of disseminating information. Through regulation of programme content, access priority, and so on, governments with this jurisdiction will have the ability to pursue their own concept of Canadian cultural identity. Also, of course, the potential exists for governments to use telecommunications to further their own political aims either by creating their own programming or by controlling other content that can be disseminated.

Jurisdiction over interprovincial telecommunications services is likely to hold the key to real control over these new services areas. Thus, it is not surprising that both levels of government want either exclusivity or paramountcy for themselves in the interprovincial arena. Furthermore, the technical possibility for both telephony common carriers and cable operators to provide these new services, and the economic probability that both will do so (unless one or the other is prevented from doing so by government action), makes it important to each level to encompass interprovincial cable services and interprovincial, non-broadcast cable "programming" within their own jurisdictional area of control. Thus we find the language of the

federal proposal (see Appendix B) reserving to the federal government "the regulation and distribution, including distribution in priority to all other signals *through all or any telecommunications undertakings in a province*, of a *national program service as defined from time to time by Parliament* . . ." [emphasis added]. "National program service," in other words, is not defined as only broadcasting; rather the federal government wants to be able to define it (and to redefine it) as it sees fit. The clear implication is that non-broadcast cable services may be encompassed within the "national program" definition. Even without this ambiguous definition of national programming, the federal proposal otherwise reserves to the federal government exclusive control over all telecommunications undertakings, of any kind, "providing programming or other services beyond the limits of a province." The provinces, on the other hand (Appendix D), are quite clear that federal exclusivity over national programming will apply (*a*) only to broadcasting and (*b*) only when at least four provinces are involved. The federal government in this case is denied any possibility of defining national programming in any terms other than strictly broadcasting (and the redistribution of broadcast signals).

Finally, the essential difference in the two proposals regarding jurisdiction over the frequency spectrum and space (satellite) communications is also interpretable in terms of the implications regarding interprovincial services. Both sides agree that the federal government should have technical control of the frequency spectrum and the space segment of satellite service. But the federal proposal does not limit the federal assignment of the frequency spectrum to technical control whereas the provincial proposal does, and the federal proposal explicitly includes ground installations as part of the federal jurisdiction over space (satellite) communications while the provincial proposal does not. These distinctions would have the effect of either granting or denying to the federal government the right to regulate carriers (both telephony and cable) by virtue of their use of and with respect to their use of radio transmission and/or satellite transmission. Carrier use of both of these services is clearly most likely for long-distance service. This does not imply that long-distance intraprovincial service is excluded, only that it is the interprovincial uses that the argument developed here suggests are the most important and where the cost advantage of the technology will be most pronounced. The fact that the federal government is otherwise prepared to concede full jurisdiction over intraprovincial telephony to the provinces provides further substantiation for this position.

Politicians' preferences for jurisdiction may also be tied closely to their policy preferences. A full discussion of the potential impact of policies is presented below. For the moment, two issues will be mentioned as they are particularly relevant to the present context.

First, as a matter of conscious policy in certain provinces, most notably Saskatchewan and Manitoba, and at least implicitly in all others,[36] long-distance interprovincial telephony revenues are used to subsidize rural services. Whether such cross-subsidization is desirable in economic efficiency terms is not our present concern. In social policy terms, at least some of the provinces have made the decision that this is their preferred policy. They thus become concerned about the prospect of interprovincial regulation at the federal level leading to independent rate-of-return regulation on interprovincial toll service, thereby forcing increased tolls in intraprovincial services and, especially, rural services.

It is very important to realize that there may be a variety of different motives behind government regulation of telecommunications. Promoting the efficient allocation of economic resources is only one of these and is not necessarily the most important. Moreover, individual governments may attach quite different weights to the importance of different objectives. Thus the cultural implications of having control of the telecommunications function is especially important to Quebec while being of less importance to, say, Prince Edward Island. Providing reasonable cost services to remote areas will be of more importance to Saskatchewan than to, say, Nova Scotia, if only for geographic reasons. Ontario will be less concerned with control of ownership and use of satellite earth stations than, say, northern British Columbia. The list could go on. The point to emphasize is that the goals or objectives of telecommunications differ in a number of important respects between provinces and between the provinces and the federal government, and these differences influence politicians' preferences.

Secondly, the provinces feel that, especially regarding cable, they should have some say in provincial/regional programming (programming requirements), including educational broadcasting on cable channels. At the present time, under existing federal jurisdiction of broadcasting and cable operators, provinces wishing to distribute educational programming must apply for and receive federal approval. Such approval has not been as forthcoming as some provinces would like it to be and is often constrained in terms of access priority and total hours of broadcast time allowed.[37] Besides the fact that provincial policy goals are often frustrated in this regard, there is also some element of loss of stature for the provinces by the very process of requiring that they "apply" to the federal government for approval.[38]

At a more general level, this argument is a reflection of a different perception between the two respective levels of government as to what constitutes the "Canadian identity." Both levels are in agreement that broadcasting, and telecommunications undertakings more generally, should be used "to promote the national identity." They differ,

however, in their perception of what that means, with the provinces arguing, not unjustifiably in view of the federal track record, that the federal government sees the fulfilment of this goal in terms of uniform, Canadian-produced, nationally distributed programming coupled with community-level programming and/or citizen access (to community cable channels).[39] While the provinces do not try to deny that there is a place for such a view, they do deny that it is a sufficient view of what it means or should mean to be a Canadian. In effect, they are saying that such a uni-dimensional view of the Canadian identity is inconsistent with the federal nature of Canada, which inherently makes the expression of provincial and regional perspectives (artistically or otherwise) a necessary part of a true realization of a national identity. While Quebec has been perhaps the principal and strongest advocate of this position over the longest period of time,[40] especially given the special cultural concerns of Quebec, this is a view held by all the provinces to some degree. Once again, our present concern is not in debating the merits of these "opposing" views; rather it is to gain some greater understanding of the role of politicians' preferences in determining the respective proposals regarding the constitutional assignment of telecommunications.

The Cost of Reassignment

As Breton/Scott have argued in a recent exposition of their model:[41]

> The minimum cost solution ... is logically correct. It cannot, however, be used in the form presented for two reasons. The first, sufficient in itself to reject it, is its cost ... the costs of finding and of collecting the data, as well as the cost of computing the solution, are too high. To appreciate this, it must be remembered that the solution requires that organizational costs must be computed by first combining every possible assignment of powers with every possible pattern of jurisdictional levels and every possible pattern of governmental units for all rules of decision and representation. Secondly, organizational costs for all levels of policies, as the number of levels, the boundaries of units, and the assignment of powers change, must be calculated. Thirdly, data on all of these dimensions must be collected for every possible shock to which the system may be subjected.[42]

This nominally overstates the problem we are confronted with here, since we are dealing with only one function and only two levels of government and are looking at times at relatively small changes from the existing assignment. In fact, however, since we are unsure whether the overall least-cost assignment is consistent with the minimization of organizational costs of each function taken by itself and because some of the changes involved in the federal and provincial

proposals are not "small changes" from the existing assignment, we might not, in practice, be able to eliminate very much of the procedure laid down by Breton/Scott. Coupled with the data problem likely to be encountered in attempting the calculation, this is a very strong constraint, in its own right, against the adoption of a pure least-cost approach.

Policy Implications

Up to this point, we have maintained the assumption that the constitutional assignment can be divorced from the actual day-to-day policy decisions of government. In a strict literal sense, this assumption may be seriously questioned, since it is hard to imagine that the constitutional assignment of a function will produce no differences in policies and that, in turn, these policies will have no impact on organizational costs.

In a less than literal sense, however, this assumption could be interpreted in the following terms: because policy objectives and policy measures that may arise *cannot* be known with complete certainty at the time decisions are being made regarding constitutional assignment, the constitutional assignment will be made on the basis that the set of constitutional rules chosen are the ones most likely to favour the interests of the member of the constituent assembly voting on the assignment, that is, most likely to provide that individual's preferred policy bundle. Because of uncertainty, the individual will be disinclined to favour constitutional rules that, in the words of Buchanan and Tullock,[43]

> . . . may promote sectional, class, or group interests because, by presupposition, he is unable to predict the role that he will be playing in the actual collective decision-making process at any particular time in the future. He cannot predict with any degree of certainty whether he is more likely to be in a winning or a losing coalition on any specific issue. Therefore, he will assume that occasionally he will be in one group and occasionally in the other. His own self-interest will lead him to choose rules that will maximize the utility of an individual in a series of collective decisions with his own preferences on the separate issues being more or less randomly distributed.[44]

If we were dealing with a constituent assembly whose members were truly non-partisan, this interpretation of the Breton/Scott assumption would provide a logically correct rationalization of the assumption. This is, however, not the case with which we are actually confronted.[45] The constituent assembly in Canada today is not made up of an independent group of citizens (or politicians) especially appointed for this purpose. Rather the present equivalent of the constituent

assembly is a First Ministers' Conference, supplemented by the courts. Given the common proposal of the provinces on telecommunications, what we have is a bilateral monopoly situation where each side has well-defined interests (if not actual policy positions); hence, the position of the respective levels regarding certain policies are known. This, in turn, has two implications for the least-cost model:

1. To the extent that policy positions are known and differ between the two levels of government, politicians' preferences will be affected and, hence, the willingness to accept the least-cost solution will be affected.

2. To the extent that policy positions are known and differ between the two levels of government, organizational costs will be affected, in which case the least-cost solution may not be unique and/or may not be associated with a unique assignment. In other words, different policies imply different organizational costs; hence the least-cost assignment of powers will depend on the policies actually espoused by the two levels of government.

The first point has already been discussed in the section above dealing with politicians' preferences. The second point is a new one, however.

Suppose, to take one possible example, that it is known that the federal government, if assigned jurisdiction over interprovincial telecommunications, will proceed to implement policies that will have the effect of lowering the price of interprovincial toll calls. The provinces may disagree with such policies, on the grounds outlined earlier that this will eliminate an important source of funds for use in subsidizing relatively high-cost rural services. So far, this describes the impact on politicians' preferences. But, in addition, organizational costs may change if, *because of the policy differences rather than simply the institutional differences associated with different assignment solutions*, greater effort must be expended in any of the four categories of organizational costs. Is this possible?

The answer to this last question is yes. In particular, it is easy to envisage that co-ordination costs will rise as provincial governments expend greater effort and resources in attempting to overcome the negative implications (to them) of the federal policy. Furthermore, citizen organizational costs may also increase on the following basis. The price of interprovincial toll service, we have said, will fall and the price of basic (local) rural service, including the cost of joining the network and the cost of intraprovincial toll service, will rise. Assume further that the basic cost of local urban service either remains unchanged or rises as provincial authorities seek to find a (partial) substitute for the interprovincial toll revenue previously used to cross-subsidize rural service. If we now assume that the incidence of

the reduced price for interprovincial services is more evenly distributed between urban and rural residents than the incidence of the burden of higher prices for local rural service and intraprovincial toll service (which falls most heavily on rural residents), then rural residents may increase signalling and mobility efforts (and hence costs) by more than urban residents reduce such efforts. Mobility costs in this case will not involve moving to another jurisdiction in search of a preferred policy bundle but rather within the same jurisdiction to a different location where the same policy bundle implies a different incidence for the individual, that is, moving to an urban location. While this may not be as likely for private citizens, it may be a quite real possibility for corporate citizens, especially decentralized rural enterprises with a high volume of intraprovincial calling. Alternatively, or more probably concurrently, the signalling costs of rural residents or citizens living in relatively remote areas can be expected to rise as they lobby against policies to which they are opposed.

A number of other similar examples of this type of effect could be cited. This should not, however, be necessary. This single example should be sufficient to establish the general point that policy decisions may influence organizational costs and, hence, where different assignments are certain or even likely to produce different policies, the least-cost assignment may be influenced. Moreover, there may no longer be a unique relationship between the assignment of the telecommunications function and the minimization of organizational costs.[46] Again, an important point to remember is that the goals of telecommunications regulation may differ from one jurisdiction to another. The least-cost model minimizes the organizational costs of the constitutional assignment, not the global resource cost of the sector. In other words, socially desirable policy goals are quite admissible in the least-cost model. It is because of this, and because such social policy goals may, and do, clearly differ between jurisdictions, that the possibility of non-uniqueness between the assignment and the minimization of organizational costs arises.

The Influence of Technology

As Breton/Scott point out, "changes in the technology of producing private or public goods"[47] may influence organizational costs and, hence, the assignment of functions. As an example of this, they cite the case of cable television replacing off-the-air broadcast reception.[48] Other examples that can be cited include the following:

1. *Satellite systems replacing terrestrial transmission networks* — as satellites come to be used increasingly for interprovincial services, transmission will be directly from point A to point B as opposed to the present terrestrial network that must pass the message through all provinces between A and B. If A, for example, is Nova Scotia while B is

British Columbia, then a terrestrial transmission will involve not only Nova Scotia and British Columbia but also the other seven provinces in between. Moreover, equipment that is owned by the carriers in all of these in-between provinces will be utilized in the transmission, giving rise to the complicated revenue-sharing formula of TCTS, which compensates carriers in each province for messages "passing through" as well as messages originating or terminating in their boundaries. Because satellite transmission eliminates this phenomenon, co-ordination activities will be reduced, and, hence, as satellite use expands, we can expect co-ordination costs to fall, *ceteris paribus*.

2. *Emergence of competition* — there is already considerable pressure in the telecommunications field from actual or potential market entrants in several areas:

- Terminal attachments
- Private data networks
- Cable versus common-carrier delivery of non-broadcast services
- Dedicated voice and data services with interconnection to the common-carrier network to provide dial access
- Paging services
- Mobile radio systems

Much of this emerging competition stems from or is related to new technological developments especially in the combined use of computers and telecommunications. While the implications of such competition will often depend on the specific technology involved and on the specific area of service, some general conclusions regarding the impact on organizational costs are possible. First, the emergence of more competition could produce either an increase or a decrease in administrative costs. If increased competition implies a concurrent decision to deregulate parts of the industry,[49] then administration costs (which by definition include the institutions and other costs required to implement, monitor, and enforce policies) might be expected to fall. On the other hand, increased licensing applications, equipment testing and certification, research effort, and so forth, imply an increase in administration costs. Which of these two effects dominates will determine whether, on balance, administration costs rise or fall. Secondly, the specific case of potential competition between cable operators and common-carriers implies increased co-ordination costs, especially if the two areas are assigned to different jurisdictions. Thirdly, the proliferation of competitive service offerings, if they are not introduced uniformly throughout the country (which is not, incidentally, guaranteed by a federal assignment of jurisdiction), may produce a greater diversity in the service bundles

available in different locations. This could produce an increase in signalling and mobility costs.

3. *Videotex services* — the commercial availability of videotex services such as Telidon can be anticipated in the next few years. The emergence of such a new service will, in itself, occasion new policies, thereby increasing administration costs and, probably, co-ordination costs in so far as interprovincial services will be involved either on the production and hardware side or on the consumption side. Depending on the market structure that arises (or is allowed) for videotex, and especially if both cable operators and common carriers emerge as competitors, co-ordination costs are likely to rise. So too, the expansion of videotex services from a simple information retrieval system to broader consumer uses such as electronic mail, home shopping, and home banking will increase the degree of overlap between telecommunications and other constitutional functions such as banking, postal service, and retail business. This, in turn, will likely cause an increase in co-ordination costs, unless all such interfunctional overlaps fall within the assignment bundle of the same level of government; this is unlikely, given the very broad range of other areas that videotex is likely to touch upon.

4. *Regional disparities in Canada* — whatever the role that telecommunications historically has played with regard to the spatial location of economic activity in Canada, new technology already introduced or soon to be introduced promises to have a very real impact. On the one hand, the technology creates substantive possibilities for decentralization of "footloose" office establishments and thus adds a new policy weapon to the traditional arsenal of regional development policy in Canada. On the other hand, the technology may also create significant centralization tendencies by allowing centre firms to more effectively penetrate periphery markets; by allowing more effective, easier supervision from a distance, thereby cementing management and control of periphery branch operations in the centre, and allowing a reduction in periphery establishments; by permitting centralized inventory holdings, thereby reducing depot operations and employment in periphery regions; and so on.[50] In terms of organizational costs, these potential implications of new telecommunications/computer technology and new applications of the technology have the effect of significantly increasing the interprovincial externalities of telecommunications and thereby increasing co-ordination costs; and potentially increasing signalling and mobility costs if the policy bundle in each jurisdiction creates differences in the availability of, or in the degree of access to, this technology and its service spin-offs. In this latter regard, it is noteworthy that a federal assignment over all or part of the telecommunications function will not necessarily prevent this and may even accentuate the effect. If

federal assignment creates uniform, national-level policies, then there could be greater diversity in the service bundles available in different regions than would be the case if there were a provincial assignment.

5. *Direct use in search/signalling activities* — as a final illustration of the implications of technological change in telecommunications for organizational costs, several writers have pointed to the possible use of the technology for directly polling citizens regarding their policy preferences.[51] Opinion polls and surveys conducted by telephone have been used for some time. Advances in technology could mean both more comprehensive coverage of citizens, more detailed (through the use of videotex) and more frequent polls, and quicker, automatic compilation and analysis of results (by having answers fed directly into computers). If this results, then the administrative cost of searching for citizens' preferences will be reduced. To the extent that this improved avenue of government's search for citizens' preferences also permits citizens to reduce part of their own signalling activities, then citizens' signalling costs will also be reduced. One of the important implications of this, if in fact it comes to pass, is that it is likely to favour an increasing degree of centralization in the overall assignment solution, including telecommunications. The federal government would be the potentially greater beneficiary of the reduction in administrative costs resulting from the reduced cost of search for citizens' preferences. Since it was the increase in these costs at the federal level (which counterbalanced the potential economies of scale of a federal assignment) that led to the assumption that administrative costs would be the same at either the federal or provincial levels, when search costs fall, the federal assignment is more likely, *ceteris paribus*, to produce lower administrative costs than would result from a provincial assignment. In a similar fashion, citizens' signalling costs were postulated to be greater at the federal level than at the provincial level. If signalling costs are reduced, as a result of new telecommunications technology, then it is likely that the costs of signalling activities at the federal level will fall proportionately more than at the provincial level.

The Use of the Least-Cost Model

The discussion of the preceding sections points out that, on the one hand, the least-cost solution may be indeterminate or too costly (relative to the expected gains) to determine and, on the other hand, it fails to take proper account of the preferences of the respective levels of government. None of this analysis, however, changes the general proposition advanced earlier that, from society's point of view, a constitutional reassignment will be desirable if, all other things being equal, it reduces organizational costs and undesirable if, all other things being equal, it increases organizational costs. To this we may

also now add a corollary proposition that when, owing to an exogenous change in organizational costs such as that associated with changing technology, the relative cost advantage of assigning a function to one level rather than another is altered, a reassignment of the function may be in order. Finally, as the discussion of the last several sections has demonstrated, the objective of cost-minimization must be constrained, or put in the context of, the agreed-upon goals of government.

If these three propositions are applied to the respective federal and provincial proposals, the following conclusions may be drawn:

1. The overall least-cost solution is unknown because of data problems, the cost of calculating it and of implementing it, and the possible sensitivity of organizational costs to actual policies.

2. The federal proposal, as previously stated, appears to be a lower-cost solution than the provincial proposal; technological developments are likely to make the relative cost advantage of a more centralized assignment even greater.

3. The federal proposal fails to take adequate account of provincial politicians' preferences, primarily by defining all areas of federal jurisdiction in terms of exclusivity.

4. The provincial proposal fails to take account of federal politicians' preferences and of the cost advantage (in terms of organizational costs) of a federal assignment particularly by making all areas of concurrent jurisdiction subject to provincial paramountcy.

5. The provincial proposal's guarantee of "the free flow of information" is too weak to offer any real guarantee against such disruption. The "free flow of information" is the equivalent in our terminology of minimizing the efficiency losses due to the externality or spillover effects of telecommunications. This weakness in the guarantee could therefore produce a substantial increase in organizational costs.

6. The federal proposal's "joint regulatory board" is an inadequate means of providing the provinces with an effective vehicle for expressing their concerns regarding interprovincial services and related matters. Not only does each province not have a member, but, more significantly, the very essence of an independent regulatory tribunal necessarily precludes any ongoing provincial influence over the provincial nominations to the board, beyond the stage of initial appointment.

7. The federal proposal for dividing jurisdiction over cable operators, while making substantial transfers to the provinces, retains exclusive federal control over the definition of "national programming" and its regulation and distribution (including its distribution priority) and over any interprovincial cable services. Again, the results of this could be to deny any effective voice to provincial preferences in these important areas.

8. Neither proposal adequately reflects an appropriate concern for the increased costs that would result from dual regulation of telephony carriers who provide both interprovincial and intraprovincial services, which, moreover, utilize a common physical plant.

9. The provinces' proposal offers no special recognition of the "national carriers," namely CNCP Telecommunications, Teleglobe, and Telesat, provincial regulation of which would involve a major increase in administrative costs and, probably, in co-ordination costs.

10. A change in the federal proposal from federal exclusivity in all areas involving interprovincial services to concurrent jurisdiction with federal paramountcy would still not adequately take account of provincial preferences.

11. For the provinces to drop their condition of provincial paramountcy in all areas of concurrent jurisdiction would, in itself, potentially render the expression of provincial preferences impotent.

Basically, the provinces' proposal is insufficiently concerned with costs, while the federal proposal is insufficiently concerned with provincial politicians' preferences. What is needed is a compromise that attempts to take account of provincial preferences without unduly sacrificing the cost advantage of a federal assignment. Before we turn our attention to constructing such an alternative, however, we will stop to examine a number of specific policy issues in the telecommunications field with which future regulation of telecommunications will have to be concerned. The reasons for doing this are twofold: first, it will be useful to have some appreciation of these issues by way of helping to put the question of constitutional assignment into better perspective; and, secondly, it will provide an opportunity to explore further the implications between the assignment and policy.

Major Policy Issues

While the policy issues in the telecommunications field are many, the following are singled out here as being of particular importance:

- Competition, including new entry, terminal attachment, and interconnection
- Foreign involvement in Canadian telecommunications, particularly transborder data flows and cable distribution of U.S. television stations
- Rate levels and structures (of common carriers), including cross-subsidization
- New services
- Forms of regulation.

Each of these will now be examined in turn.

Competition

Largely owing to technological change, the traditional monopoly position of common carriers has been increasingly challenged in the last several years. In the United States, this has led to a dramatic increase in competition in the industry on several fronts, including terminal attachments, transmission services, equipment manufacture, software and consulting services, toll service, and data networks.[52] While this trend is not yet as dramatic in Canada, it has begun; to the extent it has been slower to develop, one of the major reasons is undoubtedly the reluctance of Canadian regulators (and governments) to quicken the pace.

The arguments in favour of allowing increased competition in almost all facets of telecommunications services are compelling. The recent report on regulation by the Economic Council of Canada concluded:

> Our review of the issues and the evidence leads us to advocate the introduction of greater competition in the telecommunications sector. The available evidence suggests that the gains arising from economies of scale, which in turn might justify the persistence of a telecommunications monopoly under the control of a regulatory agency, are much less obvious than is traditionally assumed to be the case. In addition, rapid technological change is injecting a competitive challenge on many fronts — from simple household attachments to complex business services. The tremendous potential for the development of substitute products and services is a major constraining influence on market power in virtually all aspects of telecommunications. At the same time, competitive market structures can promote dynamic efficiency and help to ensure that the immense opportunities for the introduction and diffusion of new products and processes in telecommunications are realized.[53]

Another recent study has noted:

> . . . technological changes are assaulting long-standing assumptions of economies of scale in R&D, in manufacturing, in telecommunication services. The acid test for economies of scale is market entry, a process endemic to virtually all levels of communication activity.[54]

Against this view that the traditional "natural monopoly" arguments in favour of carrier monopolies in telecommunications (including vertical integration in the equipment field) no longer hold, if they ever did, is the argument, strongly advanced by the present monopoly carriers, that competition fosters "cream skimming." Basically this argument holds that the entire telecommunications network and range of services must be looked at as an integrated whole. By permitting competition in certain services, such as toll service, or in

certain geographic areas, such as urban service areas, the common carriers are forced to be more competitive (and less profitable) in the most lucrative service areas while being left to carry out a social mandate (often imposed by regulators and government) in less lucrative areas such as rural services. The result, it is charged, will be either a deterioration in the quality and range of services in these less lucrative areas or significant increases in the price of such services, as competition siphons off the traditional source of financing (subsidization) for these less profitable (or unprofitable) services.

While this response by the carriers is not without merit, it does suffer from certain problems. First, it has not yet been precisely determined what the net effect on carrier revenue (and profitability) from competition will be. It is possible, for example, that as competition in the toll market increases, forcing the price of toll calls to be lowered, there will be a sufficient increase in the volume of toll calls to cause carrier toll revenues to rise.[55] This effect clearly depends on the price elasticity of demand for toll calls, which may or may not be proven to be of the requisite value to produce such an increase in revenues. What is established for present purposes, however, is the uncertainty that surrounds the question. Secondly, the argument involving the impact on less profitable, but socially desirable, services is essentially an equity argument, whereas the argument in favour of increased competition is largely an efficiency argument. Equity concerns are by no means illegitimate, but neither are efficiency concerns. As a general proposition, a given equity goal should always be accomplished with the least possible sacrifice in efficiency. To reject the carriers' argument that a continued monopoly in potentially competitive market areas is necessary in order to subsidize less profitable service areas does not imply a rejection of the social desirability of such services; rather it may simply imply a rejection of carrier-internalized cross-subsidization as the means for accomplishing such social objectives on the grounds that such a system is not necessarily the most efficient way of doing this. Thirdly, the argument becomes quite "fuzzy" in drawing clear lines between profitable services, unprofitable (or less profitable) services, subsidized services, and socially desirable, unprofitable services. In other words, there is a danger in accepting this argument that it will be used to justify a variety of carrier rate practices that cannot or should not be justified on social-equity grounds. Rate structures, as opposed to overall rate of return, have, in fact, traditionally received relatively little attention from regulators, on average[56] and, very often, lack an *explicit* social policy mandate from government, although there are obvious exceptions to this.[57]

Given our conclusion regarding the desirability of competition, the question that arises in the context of this paper is whether a federal or

a provincial jurisdictional assignment is most likely to promote competition.

While the answer to this question cannot be certain, on balance it is most likely that a federal assignment will ultimately be most conducive to promoting effective competition. This conclusion is based on the following reasoning: the federal regulatory level has already shown a greater willingness than provincial regulators to "experiment" with competition; interprovincial services are likely to be one of the most important competition areas in the foreseeable future, and a national regulatory environment is likely to be more attractive for new firms seeking entry to the interprovincial arena; and political pressures (from user groups, potential service providers, etc.) in favour of increased competition might be more effectively concentrated at the federal level, or, viewed from the opposite perspective, provincial monopoly carriers might be likely to carry more weight with provincial governments/regulatory bodies than with the federal government/regulatory body.[58]

In fairness, it should be noted that to the extent that there is still considerable uncertainty regarding the full implications of a more competitive market, a provincial assignment of jurisdiction might offer the advantage of more selective experimentation. In other words, competition could be introduced in one or a few provinces, rather than all provinces together, thus affording the other provinces the results of such experiments before committing themselves. Given that this approach would, however, constrain the market size of new entries to the trial jurisdiction, it might not represent a fair test of the viability of competition, especially if economies of scale therefore fail to be realized and if interprovincial services are precluded from inclusion in such an approach.

Non-Canadian Services

The Canadian telecommunications network is linked, at present, with the telecommunications network of most other countries of the world. The number of such links is, moreover, likely to grow significantly in the next several years. An increasing number of communications satellites will be launched to provide network services to the U.S. market. These satellites will have the simultaneous capacity for serving parts of the Canadian market. Also, the increasing availability and accessibility (in terms of price) of satellite earth stations will make foreign television programming transmitted via satellite more readily and more widely available in Canada. Two major policy issues that emerge in this context are, first, the issue of transborder data flows and, secondly, the issue of access by Canadians to foreign (U.S.) television through cable (or direct reception).

The issue of transborder data flows is, in fact, a whole series of issues involving such questions as loss of jobs (to the United States) because of centralization of computing facilities by U.S. multinationals operating in Canada; the implications for a domestic satellite industry in Canada if U.S. satellites are used to provide Canadian services; privacy; foreign control of vital parts of the telecommunications and computer infrastructure; balance-of-payments problems; and access to information by Canadians and by government in Canada.[59]

There is no obvious answer to the question of how much control, if any, countries, including Canada, should seek to place on transborder data flows. On the one hand, there may be significant efficiency gains for Canadian (-based) business in permitting relatively unrestricted data movements across borders. On the other hand, there are a number of potentially serious problems that might be increased by this phenomenon, which, while not new, is of rapidly growing magnitude.

In jurisdictional terms, the issue of whether the federal government has exclusive authority in dealing with matters of an international character is one that the provinces have disputed.[60] In this case, however, there is a major danger that provincial jurisdiction could prove disruptive to the free flow of information within Canada. If the provinces were empowered to deal with transborder data flows and if some provinces attempted to put controls on such flows while others did not, then those attempting the controls could be easily frustrated simply by routing the data flows in and out of Canada through a province without controls or with less stringent controls. If this practice were adopted, however, then the provinces attempting to impose controls might be tempted to interfere with information flows within Canada in order to prevent this circumvention. While it would be for the judicial system to rule whether such action "in its pith and substance"[61] was directed at the disruption of the free flow of information in Canada, to the layman it is conceivable that the courts might rule that it was not, since such legislation or other action would be primarily directed at controlling international information flows.

Under the provinces' constitutional proposal for telecommunications, federal exclusivity in the area of international undertakings includes only technical matters relating to the radio frequency spectrum and "foreign broadcast signals." International telecommunications and hence transborder data flows would be subject to provincial paramountcy.

The issue of foreign broadcast undertakings being received and distributed in Canada has grown in importance with the spread of cable television systems. It is not proposed to repeat the arguments of this debate here except to note that Canadians, in general, have clearly demonstrated in their viewing habits an overwhelming

preference for American television. The policy of the federal government (through the CRTC) has been to promote Canadian programming in large part by attempting to restrict foreign programming or channels.[62]

Rather interestingly, the provinces' proposal for telecommunications jurisdiction leaves the control of foreign broadcast signals exclusively in federal hands, as does the federal proposal. The necessity for this in the case of cable television is not as strong as with the transborder data flows issue just discussed, primarily because foreign broadcast signals are typically independently picked up by cable operators and it would pose no difficulty for a province to restrict the home distribution of U.S. channels or programmes by cable operators within its jurisdiction *without* interfering with information flows more generally. This absence of interjurisdictional spillovers arising from provincial control of foreign television channel distribution by cable means, *ceteris paribus*, that provincial control in this area might be desirable in terms of the Breton/Scott model. The unpopularity of a restrictive policy might, however, explain the provinces' willingness to leave this in federal hands.

As the size and cost of earth stations continue to fall and as satellites are increasingly used in the United States for broadcasting, the nature of the problem of controlling home reception of foreign television programming and channels may become more difficult. Again, however, there is no obvious advantage in a federal assignment on this basis alone, save that the federal government may be more immune to the political consequences of the citizen backlash to be expected especially in relatively remote areas of the country.

Rate Structures

From a policy perspective, the question of rate structures is an important one, although traditionally it has received relatively little attention from regulators compared to the emphasis on overall rate of return.

A recent study carried out for the Economic Council of Canada by Fuss and Waverman makes the following conclusion regarding Bell Canada's rate structure:

> There is evidence that revisions in the rate structure would improve social welfare. Our study indicates that monopoly message toll rates are too high while local service rates are too low. Moderate changes in the rate structure would lead to large increases in toll output and only small reductions in local demand.[63]

Mention has previously been made of the cross-subsidization of local service, especially in remote and rural areas, by toll revenues. This cross-subsidization is typically justified on social equity grounds,

which, in itself, is not to be faulted as a legitimate goal. But, as Fuss and Waverman point out:

> Equity considerations *can* dictate departures from efficient pricing schemes. However, the present structure of Bell Canada's prices is so inefficient that equity would have to imply social welfare weights which were strongly dominated by local service users in order to rationalize this structure.[64]

While the Fuss and Waverman study examines only Bell Canada, it is most probable that the same findings would be generated for the other provincial common carriers. The policy implications that result from this situation are (1) that present rate structures are inefficient; (2) that equity considerations do not likely justify the extent of inefficiency; (3) that internal cross-subsidization of services or users is not the only or, more importantly, the optimal method for achieving equity goals; (4) that over-pricing of interprovincial toll calls may conflict with regional equity goals to the extent that telecommunications, especially in terms of new computer/communications technology, represents a new policy tool for government's regional development policy;[65] and (5) that Canada's ability to maximize the potential benefits of the "information age" will require the telecommunications network to be operated and priced as efficiently as possible — this is especially relevant to interprovincial services and prices.

A federal assignment of jurisdiction over interprovincial services is more likely to produce a set of interprovincial rates closer to the efficient level than is a provincial assignment. This, of course, is subject to the actual policy goals (and instruments) chosen by the federal government. Also, it is of course *possible* that a provincial assignment could achieve this same result; in view of the stated policy position of some provinces and the implicit position of most others, this is, however, *quite unlikely*. An interprovincial telecommunications transaction involves necessarily at least one party outside of a given province. When the call takes place, this party enjoys part of the benefit. If it does not occur, this party also suffers part of the loss. A "tax" imposed on interprovincial calls by one province will thus be borne, in part, by residents of other provinces. The ability for a province to pass off part of the burden of a tax on non-residents in this manner makes such a tax particularly attractive for provincial governments. While this helps explain why the provinces are likely to embrace such a policy, given the opportunity, it is also the reason why a federal assignment is preferable in this case.

A further issue, separate though not unrelated to the question of rate structures, is the question of cost structures. Efficient pricing, in itself, requires some estimation of individual costs, that is, cost separation, and cost separation is clearly a prominent concern in

evaluating common carriers' pricing response to new competition. To date, the federal level has shown more interest in this than have provincial regulatory authorities. Beyond this, the question of costs also raises the issue of equipment supply and vertical integration in the telecommunications industry.

There are, in fact, two sub-issues involved here: first, the implications of carriers buying from their own equipment manufacturers for the cost of service (and hence price) and, secondly, the implications for the emergence of an efficient, competitive Canadian equipment manufacturing sector. Space limitations here do not permit a detailed discussion of these issues. The relationship between Bell and Northern Telecom is currently the subject of a hearing before the Restrictive Trade Practices Commission. Until the results of that inquiry are known, there may be little that can be said of a definitive nature on this issue.

The question of the emergence of a Canadian equipment manufacturing sector is a complex one. As Fournier has noted,[66] past procurement policies have been a mixed blessing — they have been "extremely successful in building up one supplier (Northern Telecom) to multinational status," but they have also stifled the emergence of other major Canadian manufacturers such that "with the exception of the U.S.-controlled AEL Microtel (which is affiliated with B.C. Tel), there are no other Canadian manufacturers whose sales of telecommunications products exceed $50 million annually."

More competitive procurement policies by the carriers, fostered further by the emergence of service competition including direct competition in customer equipment as and when rules governing terminal attachments are further relaxed, could provide an important spur to the emergence of major Canadian equipment suppliers. In turn, it is not impossible, as evidenced by Telidon, that Canada could develop this industry into a position of technological leadership on a global basis. On the other hand, as Fournier also points out, the present lack of major Canadian equipment suppliers (with the exception of Northern) may mean "that manufacturing opportunities arising from more competition in telecommunications, and which cannot be exploited by Northern Telecom, may be exploited by foreign manufacturers."[67]

The optimal strategy is clearly, as Fournier goes on to say,

> . . . to encourage small but promising high technology Canadian firms so that they may grow to a size whereby they can take their place as recognized suppliers to the Canadian market. They must be developed to the stage where they can compete — not only with each other — but with foreign firms both in Canada and in world markets where these are accessible.[68]

The implications of this concern for equipment manufacturing for the jurisdictional assignment are not entirely clear. On the one hand, a provincial assignment could, if procurement policies imposed on carriers differ substantially between provinces, lead to a fragmentation of the market such that the future growth of Canadian firms is inhibited. A provincial assignment might also emphasize cost more than country of manufacture in those provinces that lack any manufacturing capability of their own, which, analogous to an infant industry tariff argument, might prevent the emergence of a competitive manufacturing industry. A federal assignment, on the other hand, might be more prone to pursue the goal too vigorously, promoting Canadian manufacturing where no potential comparative advantage exists and where the result, therefore, is simply higher equipment costs, higher costs for telecommunications services, and inefficient use of resources in the manufacturing sector. The best solution might prove to be a co-operative federal-provincial effort where each level would provide some check on the other. Concurrent jurisdiction would be one means of invoking such co-operation.

New Services

The technological change that has characterized the telecommunications field (and the computer field) in the last two decades, and the likely continuation of this at a relatively rapid pace in the next decade, has resulted in a variety of new service offerings, actual or potential, in the telecommunications field. As has been previously noted, this technological change has played a dominant role in the emergence of competition, itself a major policy issue; it is a key element in the issue of equipment manufacturing just discussed, and may, potentially, significantly affect organizational costs.

While the question of new services poses a number of policy issues, only two of these issues will be singled out here for discussion as they may be of particular significance to the question of constitutional jurisdiction: (1) the anticipated growth in information services and networks and (2) the issue of competition in the offering of such information services.

The growth in information services and networks that may be anticipated over the coming decade has already begun both in private business networks and in the home consumer market. Extensive field trials of Telidon are already under way and introduction of a commercial Telidon service may be anticipated in the next few years. While Telidon or similar interactive information networks initially are likely to be limited to the offering of information retrieval services, as well as some entertainment services, over time they are likely to be expanded to provide electronic banking services, shopping from the home, electronic mail, fire and burglar alarms, educational

services, and a wide variety of other consumer services and activities.[69]

The introduction of information networks such as Telidon poses a number of policy issues such as who shall pay and on what basis; who provides information; who provides the transmission facilities; and who owns and controls the computer facilities. From a jurisdictional point of view, provincial jurisdiction over telecommunications could very well produce different answers to these questions in different provinces. This may or may not be objectionable. From an efficiency point of view, such diversity could introduce market fragmentation and inhibit the development of what could potentially be a very high growth sector in the economy. From an equity point of view, the potential displacement of jobs, especially in periphery regions of the country, in such fields as publishing (including newspapers and magazines), research and reference organizations, consulting firms, retail store clerks, and bank clerks, could accentuate regional disparities; individual provincial response to this problem might reduce such negative implications for the provinces (regions) in question.

One of the other very interesting jurisdictional issues posed by the introduction of information networks is that of increasing overlap of the telecommunications function with other functions of either the federal or provincial levels. Three obvious examples would be electronic banking (which creates an overlap between the telecommunications function and the banking function), electronic mail (which creates an overlap between the telecommunications function and the postal service function), and distance education (which creates an overlap between the telecommunications function and the education function). The first two examples, banking and postal service, are current areas of federal jurisdiction while the third, education, is a current area of provincial jurisdiction.

The problem that is posed by this overlap of functions is obvious: if overlapping functions are assigned to different levels of government, the possibility is created for one level to frustrate the actions of the other. The answer to the problem is, however, not obvious, because, in this case, there is overlap with functions assigned to each level of government so that one cannot invoke a simple principle that highly complementary functions should always be assigned to the same level of government. To the extent that both levels of government are involved, this may be an argument in favour of some form of concurrency. On the other hand, this will not necessarily solve the problem and may be particularly sensitive to the particular concurrency arrangement adopted.

The issue of competition in the market of information networks has a number of dimensions ranging from the arrangements governing

information providers through to arrangements governing transmission (or distribution) services. This latter dimension is of particular importance for telecommunications service providers because both telephony carriers and cable operators have an interest in, and the technical capability for, providing distribution facilities. Not only may common carriers and cable operators become market competitors, but, with further technological advances, for example, in small earth-station technology, other competitors may also emerge.

Given this likely competition between cable operators and telephony carriers, with each other and/or with future market entrants, there is a strong case to be made for treating all telecommunications undertakings the same in terms of jurisdictional assignment. Otherwise, there is a strong possibility that major inefficiencies will result as the policy actions of one level of government with respect to, say, cable operators are offset by the policy actions of the other level of government with respect to, say, telephony carriers. Furthermore, to the extent that information networks or parts of such networks are likely to be national in scope or certainly to have a strong interprovincial character, there is a strong case for a dominant, if not exclusive, federal assignment in both areas.

Forms of Regulation

Much has been said and written on the shortcomings of telecommunications regulation in Canada by regulatory tribunals.[70] These arguments will not be treated here. Suffice it to say that the present mode and content of regulation by tribunal in Canada has been wanting in a number of important respects and some reform of the regulatory process is clearly in order.

In general, there are two major options open by way of regulatory reform: deregulation of all or part of telecommunications services or a strengthening of the regulatory process via improved appointment procedures, increased accountability (without, however, risking direct political interference in regulatory proceedings), more "active" versus "passive" regulation, separation of policy hearings from rate hearings, and so on.

On purely economic efficiency grounds, the case for more competition outlined above also argues strongly for deregulation, where deregulation means a lessening of direct control of carrier operations or selected services by formal regulatory tribunals. Increased competition does not necessarily imply deregulation. But, without some deregulation, increased competition is quite likely to introduce (or perpetuate) market inefficiencies, thus denying the primary benefit of competition. Moreover, especially in the current environment of telecommunications where firms that are potential market entrants can already be identified, deregulation is itself a means of inducing competition.

On social policy grounds, there is, however, a case to be made for maintaining formal regulatory structures and seeking to remedy their deficiencies through changes such as those mentioned above. As has been noted in previous sections of this paper, efficiency *per se* is not the sole objective and, very often, not the dominant objective, of telecommunications regulation as broadly defined. Nor is efficiency the sole or necessarily dominant concern behind direct regulation of telecommunications carriers by administrative tribunal. As has been noted by Schultz,[71]

> Although the literature places much emphasis on economic efficiency reasons for economic regulation, concern with market failure has not been the only or even — in most cases in Canada at least — the primary reason for resort to non-market governmental controls of economic activity. Governments have introduced economic regulation to attain many policy objectives other than economic efficiency. . . .[72]

To the extent that regulation of telecommunications is motivated by concerns other than, or in addition to, economic efficiency, the case for deregulation on purely efficiency grounds is weakened. Against this, however, must be put two considerations: first, on pragmatic grounds, there are many who would question whether regulation by tribunal *in practice* can ever achieve the virtues of regulation by tribunal *in theory*; secondly, it is not obvious that direct regulation is the best means, and certainly it is not the only means, of achieving social policy objectives. The case for deregulation is, however, not as straightforward as the efficiency arguments regarding competition and the inadequacies of the present regulatory environment might suggest.

In terms of jurisdictional assignment, the first point to note is that the inadequacies of direct regulation at present call for change, whether in the direction of deregulation or in the direction of strengthening such regulation, regardless of which level of government is assigned the telecommunications function. Beyond this, it is not completely clear which level of government is likely to be more inclined towards deregulation versus a strengthening of the regulatory process nor, as just noted, is the choice between these options perfectly clear. On balance, however, the case made previously for increased competition and the likely superiority of a more centralized assignment in achieving this will be adopted here as the basis for recommending a move towards deregulation, with a more centralized assignment likely to favour this more than a decentralized assignment because of the greater probable support for competition at the federal level. It is very important to stress that this conclusion does not imply a rejection of non-efficiency goals. Rather it implies only reduced

reliance on formal regulation by tribunal as the means for achieving such goals.

The Carriers' Perspective

While repeated references have been made in preceding sections of this analysis to the carriers or operators of telecommunications services, there has not yet been a systematic consideration of the carriers in terms of the jurisdictional debate.

The position of the carriers is relevant to our discussion quite obviously because they will be greatly influenced by the outcome of the jurisdictional issue. It is also important, however, because carriers' concerns may bear on the level of organizational costs. Lastly, the carriers' position on the policy issues we have just been discussing may well influence the position taken on those issues by some governments.

The carriers are, in one sense, indifferent as to the outcome of the jurisdictional dispute. What is perhaps their primary concern is that the dispute be settled in such a way that the "rules of the game" are well defined and known and in such a way that the outcome is not disruptive to the industry. The carriers do not want "two-tier" regulation or "dual" regulation that could produce conflicting and, quite likely, duplicative regulation. This is a concern that our analysis supports, since duplication in regulation would raise administrative and/or co-ordination costs as would conflicting regulation.

Beyond this general level, many of the carriers do show a preference for provincial regulation. This preference is based on the argument that regulation should be as close to the customers of the company as possible (i.e., that federal regulation of independent provincial carriers would be too remote or distant from their customers) and a concern (fear) of some of the policy directions the federal government appears to be embracing. The industry incumbents do not want more competition in the industry, do not want to lose their monopoly status, do not want interconnection, do not want customer ownership of terminal attachments, and so on.

Undoubtedly, part of the carriers' position is based on the probability that, in policy matters, they are more likely to be able to influence provincial governments than the federal government. All but two of the provincial common carriers are already under provincial jurisdiction and know the people and the institutions they must deal with. In many provinces, informal links to the political system as a way of conveying politicians' concerns and priorities to the carriers (and vice versa) are well established. Three of the companies are owned by their respective governments. All of these advantages would be lost if federal jurisdiction were to replace provincial jurisdiction.

The carriers also feel that the present arrangements for looking after interprovincial service through the co-ordinating role of TCTS have been quite satisfactory, not only for them, but for their customers. They do not want explicit regulation of interprovincial service introduced and undoubtedly feel there is a better chance of maintaining the *status quo* under provincial jurisdiction than under federal or than under a concurrency option that assigns interprovincial services to the federal level.

Without entering into a long discussion of the advantages and disadvantages of regulating interprovincial rates and services, the fact remains that failure to regulate this area, as at present, opens the door to a variety of practices, most notably the use of toll revenues to subsidize local service, which may be questionable. Moreover, the lack of explicit regulation by government means that implicitly the carriers themselves end up setting national policy in many instances. At a minimum, policy structure, at least in its broad parameters, is the responsibility of government and should be carried out by government.

The concerns of the carriers regarding the policy directions that government might take and their stated opposition to many of these positions are not of primary concern to the jurisdictional issue except in so far as a provincial assignment may lead to policies that are more to the liking of the carriers than would a federal assignment. This is not to deny the carriers' obvious interest in these decisions nor their importance in achieving desired results. But the carriers' perspective is not necessarily synonymous with the public or the national interest, and there is no *a priori* case to be made for the carriers' view to prevail, especially while the carriers continue to maintain a strong monopoly position.

The effect on the carriers of the assignment solution adopted is difficult to know, since it depends more on the policies adopted than on who gets jurisdiction, *per se*. Two-tier or dual regulation is definitely undesirable. Comparable regulation of both telephone carriers and cable operators is desirable. Provincial regulation would be more likely to be influenced by the carriers than federal regulation. In so far as this produces policies that are not the most desirable, as per the discussion of policies above, a strong federal role in the assignment solution is clearly dictated.

In Search of an Alternative Solution

The above analysis has pointed out a number of inadequacies of the respective proposals of the provinces and the federal government, while reaching a conclusion that, on balance, a relatively centralized assignment is desired. This conclusion is based on both the application of the Breton/Scott framework and the discussion of policy issues in the last section. It is emphasized, however, that except to the extent

that policies clearly influence organizational costs, policy considerations such as those just discussed should not weigh too heavily in the assignment choice. First, constitutional decisions are of a much longer-term nature than most policies if only in the sense that the latter are subject to day-to-day change while the former are not. Secondly, while a particular level of government may have an advantage in introducing certain policies that we deem desirable, there is no guarantee that, simply by virtue of the level of assignment of the telecommunications function, these policies will be embraced. Thirdly, to the extent that a particular government's current statement of policy intentions favours policies that we deem desirable, there is no guarantee that a constitutional assignment on that basis will produce the desired policy results because both the governing political party may change and the policy intentions of the same political party may change. Thus the conclusion here on the overall desirability of a relatively centralized assignment and the specific assignment solution about to be recommended is based primarily on the analysis involving the application of the Breton/Scott framework.

Given the analysis of this paper, the following general considerations can be identified as "tests" to be met by any assignment solution:

1. To be acceptable, any solution must involve some measure of concurrency. This is a principle already endorsed in both of the current proposals. As noted by Fournier (see Appendix F), "Both sides accepted that communications was an area where both levels of government had reasonable and legitimate interests."

2. The particular form (degree) of concurrency adopted must seek a reasonable balance between the efficiency (in terms of the level of organizational costs) of a complete federal assignment and the validity of provincial preferences. This point cannot be overstressed. Much of the preceding analysis of this paper has focused attention on the efficiency gains (in organizational cost terms) of a federal assignment and on the likely desirability of a dominant federal role in terms of desired or preferred policies. However, while the legitimacy of provincial concerns has not been stressed in an explicit fashion, it is implicit in the analysis that provincial interests in telecommunications must be paid more than just "lip service."

3. As noted by Breton/Scott, "Concurrent authority means that some kind of machinery will be set up to allow both levels of government to work together on devising and implementing the policies that are encompassed by the function assigned to both levels of government."[73] In other words, concurrency should imply a form of partnership. Even if the partners are not exactly equal in status, each should have an effective role to play in the decision-making process.

A Recommended Alternative

The general considerations just noted, coupled with the overall analysis of this paper, lead to the recommendation of an alternative solution that is intended to provide the following:

1. A dominant role to the federal government in order to gain as much advantage as possible from the reduction in organizational costs to be expected from a relatively high degree of centralization in the jurisdictional assignment
2. Effective participation by the provinces in the decision-making process, with a dominant emphasis on collective provincial participation, in order to foster decision making, both among the provinces and between the provinces and the federal government
3. A constitutional/institutional framework for decision making that, *given concurrency*, is most likely to minimize organizational costs.

A concurrent assignment that is intended to simultaneously achieve each of these objectives will not succeed if either level of government is granted strict exclusivity or paramountcy over the entire telecommunications function or major subdivisions of the function. Furthermore, it can be argued that the nominally attractive division of the telecommunications function between interprovincial and intraprovincial services is in fact an impractical division when coupled with exclusivity in each area by the federal government and the provinces respectively. Such a division will be unworkable in practice because it fails to take proper account of the integrated nature of Canada's national telecommunications system. Two-tier or dual regulation would result; more significantly, conflicting regulation would be a very real possibility. Finally, it is important that "policy making" as distinct from "policy administration" should reside directly with elected representatives rather than with regulatory or administrative tribunals. A major problem with regulation by tribunal in the telecommunciations field in Canada has been the assumption of a policy-making role by regulatory tribunals. The CRTC, in particular, has been severely criticized for this by the provinces. This practice does not necessarily reflect a usurption of power by tribunals; rather, in many cases, it represents an abdication of responsibility by governments. More importantly, to the extent that the role of the provinces in the decision-making process is to be a real one, the provinces must be in a position *at a political level* to participate in policy determination. Beyond this, concurrent assignment creates the possibility that regulatory tribunals with responsibility for the regulation of various aspects of telecommunications services will be introduced by both levels of government. In this case, it is crucially important that regulators at both levels operate under a common set of

rules (policies), at least in areas of interdependence, in order to avoid conflicting regulation. This result can only be achieved if direct regulation by tribunal at both levels of government is limited to matters of "policy administration" (the implementation or monitoring of policy), while "policy determination" (the making of policy) takes place in a *joint* federal-provincial political setting. This split between "policy determination" and "policy administration" and the limitation of direct regulation by tribunals to matters of policy administration would have the further effect of limiting such direct regulation primarily to the "message delivery" aspects of telecommunications. The "message creation" or content aspects of telecommunications, as a concern of public policy, are essentially policy determination concerns. As such, the only possible role for tribunals in the message creation aspects of telecommunications, given the proposed limitation of tribunals to matters of policy administration, would be in the monitoring of industry or carrier compliance with content regulations that have been set through the policy-determination process.

The joint federal-provincial policy-setting process would be accomplished through the formation of a joint federal-provincial "policy board." This policy board would be made up of thirteen members, one from each of the provincial governments and three from the federal government. The policy board would have the responsibility for setting policy governing telecommunications undertakings in Canada (intraprovincial, interprovincial, and international services), including policy relating to "message creation" and regulations governing the redistribution of programming signals (both domestic and foreign) by telecommunications undertakings, within the following contraints:

- The board itself would operate on a simple majority voting rule.
- Recommendations of the board would be subject to ratification by the federal government and provincial governments.
- Provincial governments would be free to accept or reject decisions of the board, but, in cases involving interprovincial or international services, provinces would not be able to alter the recommendations of the board.
- The federal government would have the authority to enact laws that shall then prevail over all provinces when (1) interprovincial or international services are involved *and* (2) the policies enunciated by the federal laws or to which the federal laws are directed have been recommended by the board.
- The federal government would have the authority to enact laws (which shall then prevail) in respect of intraprovincial services when the policies in question have been recommended by the board

and at least two thirds of the provinces have accepted the recommendation.

- In cases where the federal government rejects a recommendation of the board, provincial laws that adopt the board's recommendation would be paramount.
- Any member of the board may request a formal vote on a proposal that is before the board at any time and any member may request a meeting of the board at any time; the board shall in any case meet at least twice a year.

This policy board proposal would create concurrent jurisdiction in matters of telecommunications policy that would involve a kind of "dynamic paramountcy."[74] There would be federal paramountcy in matters of an interprovincial or international character, but this would be subject to the constraint that at least four provinces would have to agree with the position of the federal government. The provinces, for their part, could gain paramountcy on a case-by-case basis, without the agreement of the federal government but *only if* a coalition of at least seven provinces could be formed with a common policy position. In this case, uniform policies, national in scope, would be set, in effect, by the provinces and would be paramount. By giving the federal government paramountcy in intraprovincial policy matters so long as the federal laws in question involve the adoption of a board recommendation and at least two thirds of the provinces have also adopted the board's proposal, uniformity in policies relating to intraprovincial matters can be achieved, when such uniformity is deemed desirable (as might be the case, for example, in such areas as equipment procurement policy). By institutionalizing the conditions of paramountcy in the ways just described, the federal government is given a dominant role, the provincial governments are given an effective voice, and within the framework of concurrency, organizational costs should be minimized.

Subject to the paramountcy conditions for policy determination as outlined, the federal government would be given exclusive jurisdiction over policy administration matters involving interprovincial or international services for *all* telecommunications undertakings in Canada, while the provinces would be in a similar position with respect to intraprovincial services. The manner in which each level of government might choose to carry out its function of policy administration is, itself, an administrative decision, not a constitutional decision. Hence, no prescription is offered here as to the way in which the administration function must be carried out, although it may be expected that regulation by tribunal would be used by most governments. Whatever the method adopted, however, the important point to note is that both levels of government would be bound in their administration by the

outcome of the policy determination process as described above, including the paramountcy provisions of that process.

Finally, all of the above provisions notwithstanding, there would be exclusive federal jurisdiction over matters of a technical nature respecting management of the radio frequency spectrum, the space segment of communications satellites, and the use of telecommunications undertakings for aeronautics, radio navigation, defence, or in national emergencies.

Conclusions

This analysis has suggested the need to consider the organizational costs of the structure of the public sector as a prime determinant of the assignment of constitutional jurisdiction over telecommunications in Canada. On the basis of a pure cost-minimization principle, a complete federal jurisdictional assignment would probably be chosen, especially in view of the strong interjurisdictional spillovers of telecommunications. This, however, ignores the preferences of provinces in an area that is obviously of real and legitimate concern to them. While the provinces' proposal submitted in September 1980 fails to adequately reflect a concern with minimizing organizational costs and would create the possibility of significant policy variations between provinces, which might prove detrimental to interprovincial flows of information and the overall efficiency of the telecommunications sector in Canada, the federal proposal submitted at the same time fails to provide a means for provinces to effectively voice their opinions and concerns on many of the potentially most important matters of telecommunications policy in Canada. The assignment solution recommended here attempts to provide an effective avenue for provincial input while maintaining a concern for the level of organizational costs. Under this proposal, all telecommunications carriers would be treated alike. Carriers would not be subject to overlapping jurisdictions. Users could be expected to benefit from uniform interprovincial/international service regulation and the probability of greater uniformity in intraprovincial regulation across provinces. Policy issues would be removed from the arena of regulatory tribunals allowing citizens (users) to focus their signalling activities directly on governments. Thus citizens' organizational costs (mobility and signalling costs) may be expected to fall. The participation of the provinces in the determination of policy positions governing interprovincial and international services provides for an effective presence. On the other hand, federal paramountcy in interprovincial and international matters (subject to the support of at least four provinces) reduces the probability of diverse regulation in these areas. While co-ordination costs would be higher than under an exclusive federal assignment (though lower than under an exclusive provincial assignment), they

may not be that much higher, since the separation of "policy determination" and "policy administration" reduces the scope of co-ordination activities, the removal of "message creation" (programming) matters from the arena of regulatory tribunals reduces the number of forums in which co-ordination activities might take place, and co-ordination activities are themselves formalized in an institutional context that should improve their efficiency. Moreover, some decrease in administrative costs is possible because of the joint setting of policies including the joint discussion of intraprovincial policies and a sharing of administrative activities involving the search for citizens' preferences. Citizens' signalling costs may, in analogous fashion, also be reduced, since signals transmitted to one level of government will, in the context of an institutionalized co-ordination framework, be more likely to be transmitted to the other level of government without citizens having to duplicate their own effort.

Any proposal for resolving the present conflict over the jurisdictional assignment of telecommunications will leave some problems unanswered or unresolved to the satisfaction of all parties. Telecommunications is, however, too important an area, in economic, social, and cultural terms, in Canada today to have the jurisdictional issue turn into a battleground between the provinces and the federal government or to be treated too lightly, with potentially harmful consequences for the economic and social well-being of Canadians. The proposal offered here attempts to provide a solution that takes account of the importance of the telecommunications sector, the needs of the industry and users, and the legitimate interests of the provinces and the federal government.

Notes

[1] C.R. Dickenson, "Telecommunications in the Developing Countries: The Relation to the Economy and the Society," in P. Polishuk and M. O'Bryant, eds., *Telecommunications and Economic Development*, papers presented at Intelcom 77 (Sedham: Horizon House International, 1977) at 75.

[2] R. Babe, *Cable Television and Telecommunications in Canada* (East Lansing: Michigan State University, 1975).

[3] *Ibid.* at 149, fn. 1 (emphasis in original).

[4] Videotex is a generic term that refers to the dissemination of textual and/or graphic information by electronic means. Videotex, so defined, refers to a two-way interactive system while one-way systems are referred to as teletext.

[5] Broadcasting signals can of course be "blacked out" in certain areas. Such exclusion is, however, not "discriminate exclusion" except on a broad geographic basis.

[6] See, for example, M.P. Hindley *et al.*, *The Tangled Net: Basic Issues in Canadian Communications* (Vancouver: J.J. Douglas, 1977) at 69; R. Schultz, "Delegation and Cable Distribution Systems: A Negative Assessment," Discussion Paper No. 11 (Kingston: Queen's University, Institute of Intergovernmental Relations, 1981); and R.B. Woodrow *et al.*, *Conflict Over Communications Policy* (Montreal: C.D. Howe Institute, 1980) at 30.

[7] Eight of the top ten telephone companies plus Teleglobe Canada are among the top 500 largest firms in Canada according to the latest Financial Post Survey. See *The Financial Post 500* (June 1981).

[8] Other documents relating to the federal position are attached as Appendices A, B, and C in this volume.

[9] "Notes for a Statement by the Prime Minister of Canada on Communications," Ottawa, 8–12 September 1980 at p. 3. (Document 800-14/039). See Appendix E in this volume.

[10] J. Fournier, "Monopoly, Competition and Jurisdictional Issues: Policy Perspectives for the 1980s," Notes for an address to the 18th Annual Conference of the Canadian Industrial Communications Assembly, Toronto, 16 September 1980 at p. 15. The relevant section of this speech is included in Appendix F of this volume.

[11] "Best Efforts Draft," Appendix D of this volume.

[12] *Ibid.*

[13] A Breton and A. Scott, *The Economic Constitution of Federal States* (Toronto: University of Toronto Press, 1978).

[14] *Ibid.* at 3.

[15] *Ibid.* at 7.

[16] For a theoretical discussion of the externality characteristics of telecommunications, see R. Artle and C. Averous, "The Telephone System as a Public Good: Static and Dynamic Aspects," (1973), 4 *The Bell Journal of Economics and Management Science* 89; L. Squire, "Some Aspects of Optimal Pricing for Telecommunications," (1973), 4 *The Bell Journal of Economics and Management Science* 515; and J. Rohlfs, "A Theory of Interdependent Demand for a Communications Service," (1975), 6 *The Bell Journal of Economics and Management Science* 16.

[17] Breton and Scott, *supra*, note 13 at 52–61.

[18] *Ibid.* at 74–76.

[19] *Ibid.* at 75. The diagram as shown here reverses the curves as shown by Breton and Scott. Either portrayal is correct depending on the set of stability conditions chosen.

[20] *Ibid.* at 77.

[21] *Ibid.* at 78–84.

[22] *Ibid.* at 90.

[23] *Ibid.* at 58.

[24] *Ibid.* at 97.

[25] *Ibid.* at 97.

[26] *Ibid.* at 97–98.

[27] See, for example, R.W. Phidd, "Review of *The Design of Federations* by Albert Breton and Anthony Scott," (1981), 2 *Canadian Public Policy* 372.

[28] It is assumed that the number of major telephone companies is not likely to be reduced. While it is possible that the degree of concentration in the cable industry could continue to increase (on this point, see, for example, Woodrow *et al.*, *supra*, note 6 at 24), a significant number of independent cable operators will almost certainly continue to exist.

[29] For a discussion of the regional implications of telecommunications, see B. Lesser and L. Osberg, "Telecommunications and the Location of Employment: Implications for Regional Development Policy in Canada," a paper presented to the conference *Telecommunications in Canada: Economic Analysis of the Industry*, Montreal, March 1981; and S. Serafini and M. Andrieu, *The Information Revolution and Its Implications for Canada* (Ottawa: Minister of Supply and Services Canada, 1981) at 36–37.

[30] Breton and Scott, *supra*, note 13 at 83.

[31] It is possible that the federal government could delineate policies that do discriminate between regions quite explicitly and purposefully. Policy relating to unemployment insurance benefits is an example of such a policy.

[32] Science Council of Canada, *Communications and Computers: Information and Canadian Society, A Position Paper* (Ottawa: Minister of Supply and Services Canada, 1978) at 18.

[33] See, for example, Serafini and Andrieu, *supra*, note 29 at 11–18 and 30–33. Quite significantly, one of the reasons why "information jobs" may continue to be the fastest-growing source of employment is the job displacement effects of the new technology of computers-communications.

[34] See, for example, Department of Communications, *The Supply of Communications Equipment in Canada* (Ottawa: Minister of Supply and Services Canada, 1979).

[35] As the railroad analogy illustrates, the simple assignment of jurisdiction to government does not guarantee that the optimal policy will be enacted.

[36] See, for example, M. Fletcher and F. Fletcher, "Communications and Confederation: Jurisdiction and Beyond," in R. Byers and R. Reford, eds., *Canada Challenged: The Viability of Confederation* (Toronto: Canadian Institute of International Affairs, 1979), and Woodrow *et al.*, *supra*, note 6 at 39–41.

[37] For a discussion of provincial attitudes on this matter, see R. Schultz, *Federalism and the Regulatory Process* (Montreal: The Institute for Research on Public Policy, 1979) at 66–67.

[38] *Ibid.*; also Woodrow *et al.*, *supra*, note 6 at 67–68.

[39] See Fletcher and Fletcher, *supra*, note 36 at 172.

[40] *Ibid.*

[41] A. Breton and A. Scott, *The Design of Federations* (Montreal: The Institute for Research on Public Policy, 1980).

[42] *Ibid.* at 25.

[43] J. Buchanan and G. Tullock, *The Calculus of Consent* (Ann Arbor: University of Michigan Press, 1962).

[44] *Ibid.* at 78.

[45] It must be emphasized that this explanation is not offered by Breton and Scott themselves. It is, however, a problem which they acknowledge elsewhere. See Breton and Scott, *supra*, note 41.

[46] It becomes possible that either different assignments may produce the same level of organizational costs or that different cost levels may result from a given assignment subject to the policy bundle actually implemented.

[47] Breton and Scott, *supra*, note 13 at 83.

[48] *Ibid.* at 83.

[49] It is important to note that increased competition does not necessarily imply deregulation. This is discussed in more detail at a later point.

[50] See note 29.

[51] See P. Pergler, *The Automated Citizen* (Montreal: The Institute for Research on Public Policy, 1980), Ch. 2.

[52] See, for example, M.R. Irwin, "Technology and Telecommunication: A Policy Perspective for the 80's," Regulation Reference Working Paper No. 22 (Ottawa: Economic Council of Canada, 1981).

[53] Economic Council of Canada, *Reforming Regulation* (Ottawa: Minister of Supply and Services Canada, 1981) at 48.

[54] Irwin, *supra*, note 52 at 37.

[55] See, for example, Economic Council of Canada, *supra*, note 53 at 46.

[56] The emerging issue of competition is now forcing much more attention to be focused on rate structures (as opposed to simply rate levels).

[57] Economic Council of Canada, *supra*, note 53 at 46.

[58] The fact that the three telephone companies in the prairie provinces are owned by the respective provincial governments adds weight to this argument.

[59] See, for example, W.E. Cundiff and M. Reid, eds., *Issues in Canadian/U.S. Transborder Computer Data Flows* (Montreal: The Institute for Research on Public Policy, 1979).

[60] For a discussion of some of the legal issues involved in this question, see, for example, D. Story, "Government, a 'Practical Thing': Towards a Consensus on Foreign Policy Jurisdiction," in Byers and Reford, *supra*, note 36 at 108–24.

[61] This phrasing is used in the provinces' proposal on telecommunications jurisdiction. See Appendix D to this volume.

[62] For a discussion of CRTC policy in this regard, see Hindley, *supra*, note 6, Ch. 6.

[63] M. Fuss and L. Waverman, *The Regulation of Telecommunications in Canada*, Regulation Reference Technical Report No. 7 (Ottawa: Economic Council of Canada, 1981) at 163.

[64] *Ibid.* at 161 (emphasis in original).

[65] Lesser and Osberg, *supra*, note 29.

[66] Fournier, *supra*, note 10 at 3.

[67] *Ibid.* at 3–4.

[68] *Ibid.* at 4.

[69] See, for example, Irwin, *supra*, note 52; and Serafini and Andrieu, *supra*, note 29.

[70] The literature on this subject is too great to attempt a listing here. The Economic Council's report on regulation (*supra*, note 53) is the most recent statement on this issue.

[71] Shultz, *supra*, note 37.

[72] *Ibid.* at 10.

[73] Breton and Scott, *supra*, note 13 at 86.

[74] This description of the process just outlined was offered by Mr. Tom Grandy of TCTS.

Part V

Breaking an Impasse: A Joint Panel Proposal for Telecommunications Regulation

T. Gregory Kane*

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I. Background

The idea for this paper was sparked during a discussion of the first draft versions of the preceding papers in this volume by Schultz,[1] Lesser,[2] and Buchan and Johnston.[3] Those papers have analysed in a most comprehensive manner the various positions put forward by the provincial and federal governments over the period of the last decade in an attempt to achieve constitutional rearrangements for the regulation of the telecommunications sector in Canada.

Although we have a long history of regulation in the telecommunications industry in Canada, individual regulatory decisions are being made principally by nine different regulatory authorities, not counting the supervision of Sask Tel. Thus we have a telecommunications regulatory mosaic in Canada that defies logical explanation.[4] This peculiar patchwork quilt jurisdictional division means that the potential for different, if not contradictory, decisions from the various regulatory authorities has been realized. It can therefore be seen that issues with national dimensions are being determined by regulatory agencies that possess less than national jurisdiction.

A good example of the difficulty that a regulatory agency faces in such a situation arose in a proceeding before the Canadian Radio-television and Telecommunications Commission (CRTC) when CNCP Telecommunications applied for network interconnection with Bell Canada.[5] Regardless of whether parties were in favour of or opposed to the application, there was consensus that this was perhaps the single most important case ever to come before a telecommunications regulatory agency in Canada, especially in the context of the future development of telecommunications.[6]

Certain provincial governments expressed deep concern about the CRTC proceeding unilaterally to resolve an issue that had such far-reaching consequences.[7] In a joint presentation, the governments of the four Atlantic provinces, even though they respected the concerns of the CRTC regarding the integrity of the regulatory process, contended that a decision should not be rendered without consultation with provincial regulatory bodies.

A quotation from the CRTC's decision captures in a very practical fashion the current tension that exists in federal-provincial relations regarding the regulation of telecommunications carriers. In response to the position put forward by the governments of the four Atlantic provinces (and others), the CRTC stated, in part:

> Certain of the provinces and of the provincially regulated telephone companies opposed to the application argued that no change should be made in the existing telecommunications industry structure, which they believed would come about if the application were granted, but not if it were denied. Accordingly, it was argued by

> several that a decision as important as this one ought not to be made by a federal regulatory body acting alone. . . . The Commission is obliged by the statute to reach a decision on the merits of the application, based on the record of evidence before it. The Commission is aware of the importance of the issues raised in the present case and the fact that various committees may be deliberating on certain of the same issues. It does not, however, consider that a delay in deciding the application pending any results of such deliberations would either be desirable in the public interest or indeed lawful.[8]

In light of examples such as the *CNCP Interconnect* case, it is not surprising that an analysis of the positions of federal and provincial governments reveals fundamental disagreements in the future structure and conduct of telecommunications regulation in Canada. Schultz has summarized the relative positions succinctly, stating that the federal position "would dramatically shift responsibilities from most of the provincial governments to the federal government," while noting that "the provincial proposal is as flawed as the federal."[9]

Let us describe the situation the way it really is: there is an impasse. The classic method of breaking an impasse is to provide an alternative that is acceptable to both parties. Without overly dramatizing the matter, this paper is presented in an effort to establish acceptable, alternative procedures and co-operative mechanisms so that comments such as those found in the *CNCP Interconnect* decision quoted above will not have to appear in future decisions of agencies in Canada having responsibility for telecommunications regulation.

II. The New Regulatory Board Solution

Before describing the preferred alternative, let us examine a recent proposal that has been put forward as a possible solution to the impasse. It is a new regulatory board. Although the concept has been mooted for a number of years, it was formally placed in the arena of federal-provincial negotiations at the 1978 Charlottetown meeting and most recently by the federal government in its statement of 25 August 1980 (Appendix C in this volume).[10] In order to accommodate the concerns of the provinces in any new jurisdictional arrangement, the federal government proposed:

> . . . to create, by means of federal legislation with appropriate provincial input, a new Regulatory Board with full-time federal and provincial representation, which would have regulatory authority over all aspects of inter-provincial rates and services provided by the provincial carriers. In addition, provincial governments have, from time to time, expressed concern about the need for governments to jointly decide issues relating to conditions of service such as interconnection. The federal government proposes that the Regula-

tory Board outlined above be given regulatory jurisdiction over these matters as well.[11]

In fairness, this proposal has not had the benefit of a full discussion and, therefore, certain details remain to be provided. Nevertheless, it must be noticed that it would be an entirely new regulatory agency as opposed to a reincarnation of existing regulatory agencies having responsibility for telecommunications jurisdiction. The federal proposal envisages "the new regulatory board" being comprised of eleven commissioners, with six appointed by the federal government and five by provincial governments. There could be variations in the actual size of a particular panel. It should also be noticed that decisions of this new regulatory board would be binding on the affected parties, although there would be appeal procedures under existing federal legislation: for example, an appeal to the Federal Court of Appeal on an issue of law or a petition to the Governor in Council on an issue of public policy.[12]

As attractive as this proposal may be, it suffers from a number of flaws that, in the aggregate, are fatal. The first difficulty is that it will have to be created by federal legislation. Without putting too fine a point on it, the fact that one jurisdiction will be responsible for the creation of the new board will inevitably lead to it being characterized as a federal persona possessing the potential for provincial influence.

The second feature, which is perhaps the more significant, is that all existing regulatory agencies, both federal and provincial, will have to give up some power to this new board. In the context of protracted negotiations in which the parties are at an impasse, it belies human nature that a solution lies in everyone giving up certain powers — even if it can be argued that everyone is giving up an equal number of powers.

The challenge, then, is to establish a new ordering of regulatory responsibility in which the parties will not have to give up any powers. This is the crux of the matter, since, as Schultz has pointed out, "To the extent that the [federal and provincial] governments do recognize a need to accommodate the interests of others, they would do so only in an arrangement that they can control."[13] It is suggested that the joint panel concept is an answer to the challenge.

III. The Joint Panel Proposal

Introduction

The joint panel concept builds upon the acknowledged desire to establish a new regulatory mechanism without, at the same time, taking away significant powers from existing regulatory authorities. The joint panel concept has the potential to achieve such a result.

Unlike the new regulatory board proposal, the joint panel is not a new agency with federal and provincial representatives appointed according to some formula, but a co-operative process involving existing regulatory agencies exercising existing powers. Recognizing that details will follow, it can be stated in summary that if the joint panel concept is implemented, then the various telecommunications carriers in Canada will continue to be regulated by the same regulatory agencies as is currently the case. However, in predetermined proceedings that have Canada-wide implications, the regulatory agencies affected will be able to jointly convene a panel to consider the matter. Following the joint panel hearing, a report will be made to the regulatory agencies, enabling the ultimate decision to be made by each one of the regulatory agencies who sent a representative to the joint panel and not by the joint panel. It is only a body with power to make recommendations.

Thus the joint panel will become operative when a hearing would, in the past, have been held by more than one regulatory agency regarding a similar issue or essentially the same matter. Conceptually, it can be described as a forum of convenience allowing evidence to be presented to the various decision-making agencies in a joint proceeding. But of fundamental importance is the fact that the matter must go back to the existing regulatory agencies for decision, ideally, but not necessarily, with a unanimous recommendation from the joint panel. Of further importance is the fact that this would allow the preservation of existing appeal mechanisms.

The joint panel proposal therefore has the potential for more uniform decision making without the requirement or imposition of common solutions. It is characterized by co-operation and sensitivity, which in turn will enable the decisions of regulatory agencies in the field of telecommunications to reflect the interests and concerns of two orders of government, one of which is composed of ten provincial governments. And all of this can be implemented through administrative agreements and arrangements rather than fundamental change either through constitutional provisions or legislative amendments. This latter point is of fundamental importance. Simply stated, the legislative process is slow and unwieldy, and there is always a danger that a solution requiring implementation through legislative change would be undermined by uneven action.

The implementation of the joint panel concept could be accomplished by way of a formal agreement entered into by federal and provincial governments as well as the respective regulatory agencies. Thus for a particular jurisdiction there would be two signatories: the government (through the minister of communications or the comparable Cabinet member) and the regulatory agency (through its chairman).

The recommendation to have both the government and the regulatory agency from a particular jurisdiction as parties to the agreement

is made in light of the experience gained when the federal government entered into a communications agreement with the province of Manitoba.[14] This agreement recognized federal responsibility for the regulation and supervision of all programming services, including pay television, distributed on cable systems in Manitoba, and at the same time affirmed provincial responsibility for the regulation and supervision of all other telecommunications services distributed within the province by the Manitoba Telephone System. The agreement also allowed cable television operators to lease from the Manitoba Telephone System the cable and other equipment required to distribute signals.

This agreement was significant for a number of reasons, not the least of which was the fact that it was contrary to established CRTC policy, which provided that a cable television licensee should own, at a minimum, the local headend, amplifiers, and drops that form part of the cable distribution system. Since the CRTC had not been a party to the agreement, had not participated in its negotiation or drafting, and therefore had not agreed to the change in policy for cable television licensees located in Manitoba, it took the position that it was not bound by the agreement. Thus, following the release of the agreement, the CRTC, calling for cable television licence applications from persons desiring to serve parts of Manitoba, stated as follows:

> While the Commission was not a party to the Agreement and is not legally bound by it, the Commission would find it helpful in its deliberations on future applications for cable television licences in Manitoba, to receive comments on the terms and scope of the Agreement from applicants and other interested parties including parties to the Agreement. In particular, the Commission would appreciate a fuller understanding of the Agreement as it relates to the Commission's concern that licensees exercise effective control over their cable television undertakings. . . .[15]

From a strict, legal point of view, the CRTC was correct in stating that the agreement was not legally binding. But from a pragmatic point of view, it was regrettable that there should have been such a public disagreement between the CRTC and the Department of Communications over a policy matter; and this especially in light of the fact that the federal Cabinet set aside two licensing decisions made by the CRTC approximately two months before the agreement was concluded.[16]

This long digression is necessary in order to emphasize the need for both the government and the regulatory agency in a particular jurisdiction to be a party and thus a signatory to the agreement that will implement the joint panel concept. The experience of the "Manitoba Agreement" provides a lesson that was at the considerable expense of the private interests seeking a cable television licence and

the general public who were denied cable television service pending resolution of the dispute. A repetition of that situation must be avoided.

How the Joint Panel Concept Would Work

In this section, a description of the possible workings of the joint panel is provided. It is important to repeat that the concept can be implemented by way of agreements or administrative arrangements rather than fundamental change either through constitutional provisions or legislative amendments. Thus it will be helpful at this stage to describe the concept and leave for another time the actual drafting of the agreements or rules that would more formally provide for joint panel proceedings. The description that follows will be provided in a logical progression from the initiation of an activity through to eventual decision and appeal where such an appeal is appropriate.

1. Triggering Mechanism

Under the various pieces of legislation that govern the regulation of telecommunications matters in Canada, there are four principal sources for the initiation of a public hearing process: the regulated industry; a third party by way of complaint; a minister responsible for telecommunications by way of direction; and the regulatory agency of its own motion. It is worth repeating that the joint panel concept does not require fundamental amendment to existing legislation. Consequently, activities will still be commenced in the way they have in the past according to existing legislative provisions.

The immediate task is to identify activities that are appropriate for the initiation of a joint panel process. Since this will be done by way of agreement, a definition would have to be provided for those matters that are essentially interprovincial in nature and that should be considered by a joint panel rather than an individual agency acting entirely on its own with respect to an intraprovincial matter.

To provoke discussion, the following definition (in deliberately broad terms) is proposed:

> The joint panel concept is appropriate for a regulatory issue, a rate application, or an application for authorization that, by design or in effect, affects two or more jurisdictions where a regulatory authority is exercised over telecommunications.

It may be desirable to provide a more detailed definition of issues that would attract the joint panel process as well as specific matters to be excluded. At this stage, it is assumed that there is a commitment to explore alternative, co-operative processes and therefore the definition can be left at a relatively general level.

Note that with such a definition, not only obvious issues such as TCTS rates would attract joint panel proceedings, but also important issues in a number of categories such as the following:

- Matters affecting by design or in effect more than one jurisdiction (e.g., systems interconnection and terminal attachment)
- Issues that have significance beyond one jurisdiction and yet fall short of being considered a "Canada-wide" matter (e.g., adjacent revenue settlements as provided by member companies of TCTS)
- Major policy matters that are common to all jurisdictions (e.g., principles of rate-of-return regulation, costing methodologies, associated accounting procedures, etc.)
- Matters where jurisdiction is ambiguous or contested (e.g., non-programming services offered by cable television undertakings).

It has been noted that the definition and list of potential "joint" activities have been stated broadly by design. If the concept is implemented, it may be desirable to limit the joint proceedings in order to test its effectiveness. Since this will be introduced by way of an agreement, more precise boundaries of joint activity can be provided with any number of variations; for example, expanding into areas of joint activity in deliberate stages. The underlying notion, whether the scope of joint proceedings is expansive or limited, is that a forum is established for the common consideration of issues and problems possessing interjurisdictional implications.

2. The Hearing Process

Once a proceeding has been initiated before one of the existing regulatory agencies and the proceeding exclusively or partially includes issues that fall within the definition of a joint panel proceeding, the agency will in turn initiate the arrangements necessary to constitute a joint panel. Any one of the four initiators of a regulatory activity described above could as well be a proponent of the matter becoming a joint panel proceeding. The composition of the joint panel will be dependent upon the nature of the original application and its implications, for example:

- If the issue relates to a less than Canada-wide matter, then the participants on the joint panel will, in all likelihood, be those directly interested.
- If the issue is of Canada-wide significance, then representatives from all jurisdictions would be eligible to participate.

Thus the joint panel initially is a vehicle for a more efficient consideration of an issue that, in the past, would have been considered

by more than one regulatory agency. Conceptually, this joint consideration of the issue will be the first step in enhancing, although not ensuring, uniform decision making.

These preliminary comments will serve to explain that the composition of the joint panel will vary considerably according to the nature of the issue before it.

- If the issue relates to two jurisdictions and has no wider implications, the composition of the panel will be representatives from the two affected regulatory agencies.
- If the matter relates to a number of jurisdictions, then every one of the affected regulatory agencies will be eligible to have a representative present on the panel.

However, the system should be flexible enough that more than one jurisdiction could agree to nominate one person to represent it on the joint panel. In this way, if a Canada-wide issue is under consideration, there would be the potential for regions of the country to agree upon one representative. But such an agreement would not be a necessity, and if each regulatory agency desired to have its own representative, that would be permitted.

The practical implementation of the above scheme will require a specific power such that an agency may appoint a person to inquire into a certain matter and make a report to it. An example of the legislative provision that would be necessary is found in section 81 of the National Transportation Act.[17] The section reads as follows:

> 81(1) The [CRTC] may appoint or direct any person to make an inquiry and report upon any application, complaint or dispute pending before the Commission, or upon any matter or thing over which the Commission has jurisdiction under this Act, the *Railway Act* or the Special Act.

The CRTC has used this section in a number of ways and it has been particularly useful as an aid in dealing with periods of particularly heavy work-loads. Thus it has been used for the purpose of nominating a senior staff member to hear evidence on behalf of the commission at regional hearings when a general rate increase application is under consideration. Of more relevance is its use for co-operative activities. The best example is the *City of Prince Rupert* case[18] in which the CRTC appointed a committee of three persons to consider and report on the Prince Rupert application with a recommended decision.

In terms of legal process, the value of the section is that parties have a right to be heard by the person appointed by the commission to make the inquiry, but they do not have a right to appear before the full commission when it considers the report prior to issuing the formal decision.[19]

The best example of the necessary legislative provisions can be found in the Manitoba Public Utilities Board Act.[20] Specifically, section 30 and subsection 31(1) provide as follows:

> 30 The board may appoint or direct any person to make an inquiry and report upon any application, complaint, or dispute pending before the board, or any matter or thing over which it has jurisdiction under this Act or any other Act of the Legislature; and it may order and direct by whom and in what proportion the costs and expenses incurred in making the inquiry and report shall be paid, and may fix the amount of the costs and expenses.
>
> 31(1) A single member may hear an application, petition, matter, or complaint, over which the board has jurisdiction under this or any other Act of the Legislature; and after the hearing, the member shall report thereon fully to the board; and the board may thereupon deal with the application, petition, matter, or complaint, as if the hearing had been before the full board.

It must be stressed that in order to comply with the spirit of a joint panel concept, provisions such as section 81 of the National Transportation Act should only be used to appoint a commissioner to inquire into an application and not a senior staff member. This is not meant to be disparaging of senior staff of agencies; rather it is a recognition that joint considerations of matters that have extrajurisdictional implications should be at the commissioner level. A provision such as subsection 31(1) of the Manitoba Public Utilities Board Act, therefore, is the preferable model.

It should also be pointed out that the reference to these legislative provisions is not a reference of convenience.

It is an important legal consideration. Briefly stated, the legal proposition is that where a quasi-judicial responsibility is committed by statute to a body appointed in a prescribed manner, then, in the absence of express provisions or necessary implication, the functions must be performed by all those individuals collectively.[21] It cannot be delegated. In light of this legal consideration, it will be necessary for those jurisdictions that do not possess a power comparable to those found in the examples from the National Transportation Act and the Manitoba Public Utilities Board Act to amend the relevant legislation to provide for a comparable power to inquire into a matter and report to the agency.[22] On the other hand, many administrative functions may be delegated validly, thus enabling the practical operation of a joint panel hearing.

For administrative convenience, it is proposed that one agency be characterized as the "host" agency for the purpose of the particular joint hearing. While it is not an exact parallel, the CRTC in effect acted as the host agency in the Therrien Committee proceedings.[23]

What is important in making this recommendation is that one agency will take the initiative with respect to organizing the proceedings, making all the arrangements, and so on. What is of further importance is that one agency not be the "host" for all proceedings. Ideally, this responsibility will be shared from time to time by each agency in turn.

It was noted above that, in a legal sense, when a public hearing is taking place, conducted by a joint panel, it is a hearing of each one of the regulatory agencies who have delegated responsibility to an individual commissioner to inquire into an application with the purpose of making a report back after the hearing is completed. One value of proceeding in this manner is that individuals nominated to make the inquiry will be capable of establishing their own rules of procedure. In the long run, it will be desirable to have a formal set of rules applicable to joint panel proceedings. However, in the short run, it will be acceptable for rules to be fashioned from time to time as agreed by the panel. By proceeding in this manner, the joint panel concept will not become embroiled or will not become bogged down in procedural matters and the necessity to rationalize differing rules of procedure pertaining to the proceedings of the respective regulatory agencies.

3. The Hearing

The previous section described what are essentially the administrative arrangements required to organize a hearing process relative to a particular application. In this section, there will be a discussion of the arrangements necessary for the actual conduct of a hearing.

As a preliminary, legal point, it must be emphasized that, in law, a "hearing" does not necessarily mean a public hearing at which there is oral testimony, cross-examination, and other attributes of a public hearing process. Thus, the requirement to conduct a "hearing" may, in certain circumstances, be satisfied through an opportunity for the parties to submit written submissions. At the moment, the individual agencies being considered conduct hearings through the use of the full public hearing process, a more limited written brief process, or a combination thereof. Precisely the same mix will be available with a joint hearing process. In other words, there will be the same requirements to determine what is fair and appropriate in the circumstances in order to determine the nature of the hearing in any particular matter.

A potential criticism of the joint hearing process is that it conjures an image of a most unwieldy process, especially in light of a multiplicity of applicants and interveners. But already we have witnessed proceedings before one regulatory agency involving multiple applicants and numerous interveners. For example, in the CRTC public hearing to consider the issue of terminal attachment,[24] there

are six applicants and twenty-two interveners. The hearing has been organized in such a way that all of the evidence will be submitted in writing in advance of the actual public hearing and then witnesses will be made available for the purpose of cross-examination. To expedite the hearing process, the final argument will be in written form.

Even if a proceeding involved all of the member companies of the TransCanada Telephone System, it would not amount to many more parties than are currently before the CRTC in the terminal attachment proceeding described above. The short point is that individual agencies are coping effectively with proceedings that involve multiple parties, and it is reasonable to anticipate that a joint proceeding will be managed in a similar fashion.

A further point to be emphasized is that under the joint board concept, it is not contemplated that the individual agencies would conduct separate hearings, either in writing or through a public hearing process. The full value of the joint proceeding in terms of greater efficiency and greater co-operation will only be realized if individual agencies participate in a joint process to the exclusion of individual proceedings. However, this should not be a requirement rigidly enforced. Anticipating a situation in which the record produced in a joint proceeding does not address a particular, local issue to the extent desired by the agency in order to arrive at a decision, it may be necessary to convene a public hearing by the agency subsequent to the joint proceeding at which a specific issue is addressed. Ideally, it will not be a hearing duplicating the efforts of the joint proceeding, rather it will provide an opportunity to present further evidence relative to a specific issue that was not appropriate for consideration during the joint proceeding.

It was noted in the previous section that one agency should be designated as the "host" agency for the purpose of conducting the joint hearing. In order to gain the full benefit of such an arrangement, it is recommended that the hearing be focused on that agency. Therefore, in circumstances where the submission of written briefs would be appropriate, such briefs would be sent to that agency. Where, in the circumstances, a public hearing would be appropriate, such a hearing would be conducted in the city where the host agency is located. Concern will naturally be raised that convening a hearing in one location in Canada in a matter that potentially concerns Canada-wide issues will restrict the ability of participants who are interested in the matter being able to attend and make representations.

Once again, this is a matter that has been of concern to the various agencies being considered. To use the example of the terminal attachment proceeding before the CRTC,[25] the public hearing in Hull, Quebec has restricted the ability of participants from British Colum-

bia to take part. The CRTC has ruled[26] that it is necessary to convene the main hearing in one location and not split the activity by convening a hearing in more than one location. To accommodate the legitimate desire of certain participants to make representations, the commissioners who presided at the public hearing in Hull scheduled two days of hearings in Vancouver in order to hear representations. The representations were transcribed and formed part of the terminal attachment proceeding. In legal terms, this type of proceeding, which employs regional as well as the central hearing, is a variation on the power of an agency to appoint someone to inquire into a matter and report back to it. As noted, in a complex proceeding involving multiple parties, it is a reasonable compromise in the circumstances.

4. The Recommended Decision

To this point, a process has been established whereby the joint panel will entertain in one hearing more than one application and thereby hear witnesses on behalf of various applicants and interveners relative to particular applications. At the conclusion of the hearing, there are two procedural avenues that could be followed:

- The individuals who have been nominated by their respective regulatory agencies could make a report to their agency that would be based upon the joint record produced before the joint panel but would not necessarily relate to the recommendations being made by others on the joint panel.
- The members of the joint panel could write collectively a report that would be presented to their respective regulatory agencies. This joint report would contain a recommended decision for consideration by the individual agencies.

The important consideration is that the ultimate decision will be issued by the respective regulatory agencies rather than by the joint panel. In other words, the joint panel has no power to issue a decision and it has exhausted its mandate once the evidence has been collected and the report or reports have been written. Thus in either of the above scenarios, the matter goes back to the respective agencies for a decision.

The preference for a collective recommendation is the rather obvious consideration that if the joint panelists have arrived at a recommended result, then it will be one step in the process of persuading the agencies to issue uniform decisions in a matter that possesses extrajurisdictional implications. But that is only in the sense of the recommended decision being persuasive. The fundamental point remains that the individual boards maintain the power to issue their own decisions. Thus the potential remains that there could be differing decisions at the conclusion of the joint panel process.

5. Appeals

Consistent with the above description of the joint panel concept in which the ultimate decision is issued by the participating regulatory agencies rather than the joint panel, possible appeals would be made pursuant to the provisions applicable to the respective regulatory agencies. In addition to being consistent with the concept, such an approach to appeals maintains the integrity of the respective jurisdictions.

It has already been noted that the joint panel concept establishes the potential for differing decisions issuing from the various regulatory agencies on the basis of similar applications that originated the process. By maintaining the appeal process that is applicable to the respective regulatory agencies, this potential for differing decisions is maintained.

However, it should also be noted that this appeal process might provide an opportunity for consistency to be provided at an appellate level. This arises because a secondary ground of appeal could well be that a particular agency is the only one which has differed from the other agencies that participated in the joint panel process. While such a ground of appeal may not be sufficient in and of itself, it could possibly be a determining factor for an appellate body.

Although it is not a perfect example of the above situation, it is interesting to note the emphasis that the Prince Edward Island Court of Appeal placed on other regulatory decisions in the terminal attachment matter when considering an appeal by the Garden of the Gulf Court & Motel Inc. from a decision of the P.E.I. Public Utilities Commission.[27] After referring in particular to the CRTC interim decision,[28] Chief Justice Nicholson was moved to state, among other things, "that customer-owned terminal equipment is a 'fact of life' in the telecommunications industry. . . ."[29] While this is a vivid example, the point remains that uniformity will be but one consideration in an appellate situation.

IV. The Motor Vehicle Transport Experience

Because of the unique and constitutional nature of telecommunications regulation in Canada, there is no other area that can provide a perfect parallel and thus provide a model for the proposed joint panel concept. However, the situation with respect to motor vehicle transport regulation provides sufficient parallels that it is worthy of examination.[30]

The significant difference with respect to motor carrier regulation is that a judicial decision[31] confirmed federal jurisdiction, which, in turn, led to the federal government passing the Motor Vehicle Transport Act.[32] In this act the federal government conferred responsibility for

regulating extraprovincial motor carrier operations to the provinces.[33] In summary, where a province requires a licence to operate a local undertaking, no person may operate an extraprovincial undertaking in that province unless he holds a licence issued under the authority of the Motor Vehicle Transport Act. The power to issue a licence is assigned to "the provincial transport board in each province," and such boards are given the discretion to "issue a licence to a person to operate an extra-provincial undertaking into or through the province upon the like terms and conditions and the like manner as if the extra-provincial undertaking operated in the province were a local undertaking."[34]

As will be appreciated, motor carrier operations frequently involve the transportation of goods between more than one province.[35] Because of the complete regulatory responsibility of provincial agencies, it is necessary for such a motor carrier operation to obtain licences from each one of the provinces in which the transportation will take place. Thus, as a practical matter, a carrier might have to make several applications for what is essentially one operation.

To facilitate this multijurisdictional approval process, a "joint hearing" procedure was established by the various regulatory authorities concerned with motor vehicle transport regulation.[36] Briefly, an affected applicant must file his application in each of the jurisdictions where approval is required. The filing will be made in the manner prescribed by the rules in each jurisdiction. One jurisdiction will assume a co-ordinating role and therefore consult with all parties to discuss procedural aspects of the application. Depending upon the circumstances, the public hearing may be held in more than one jurisdiction, and this determination is made on the basis of consultation with the other regulatory agencies and all of the parties affected.

It is important to emphasize that the joint hearing procedure in the motor vehicle transport field is not one that creates a new regulatory agency. Rather, it is a procedure that provides a convenient "one-stop" forum for a carrier seeking multijurisdictional approvals. Consequently, from a legal point of view, the public hearing will be that of the respective regulatory agencies. Thus the ultimate decision will be issued by the respective regulatory agencies with the result that there can be conflicting decisions issued on the basis of the same application.

The ability of one provincial regulatory authority to issue a decision inconsistent with others when faced with the same factual application has been upheld by the court. Part of the reasoning provided in the decision is of interest and relevance to consideration of the joint panel concept relative to telecommunications. The Manitoba Court of Appeal ruled, in part, as follows:

> There is nothing in the Motor Vehicle Transport Act, express or implied, requiring the Manitoba board, or any board, to follow the

decision of another provincial board acting as a federal board pursuant to the Motor Vehicle Transport Act. The Manitoba board is not a rubber stamp. The Act could readily have contained a clause to the effect that the decision of one provincial board acting as a federal board would be binding in every province, but the Act does not so provide, and for good reasons.[37]

It must be pointed out that the joint hearing procedure in the motor carrier field has not worked to the complete satisfaction of all concerned.[38] However, on balance, it has been successful and this view is supported by the fact that there is ongoing work to try and overcome the liabilities.

In summary, the benefits of joint motor carrier board hearings have been identified as including the following:

- Utilizing the expertize of existing regulatory agencies across Canada
- Streamlining the process (thereby reducing the costs) for applicants and agencies alike
- Preserving jurisdictional boundaries
- Holding public hearings in a more efficient manner and at the convenience of parties.

The major liability continues to be the potential for differing decisions being issued by regulatory agencies that have been presented with similar factual applications. In spite of that potential, there is no strong movement to correct the situation by establishing a new process whereby a uniform decision would be issued. But note that the activity relative to uniformity is focusing almost entirely upon procedural uniformity, such that joint public hearings will not have to be held according to the various rules of procedure that pertain to the different regulatory agencies conducting the hearing.

There are other lessons that can be learned from this experience and they flow from the impressions of parties and officials who have participated in the exercise. Perhaps because this scheme was established in the wake of a judicial determination that the federal government possesses jurisdiction, the various provinces have provided their own interpretation of the power they received pursuant to the federal legislation. An extreme result has been identified in the province of British Columbia where it was determined that its regulatory agency cannot participate in joint hearings. The detailed reasons for this position are not as important as the fact that it arises from a provincial government interpreting federal legislation and coming to a result that differs from that of its other provincial counterparts.

The value of recognizing that this problem exists in the motor carrier field can rebound to the benefit of those establishing a new regulatory arrangement in the telecommunications field. The lesson to be learned is the need for a co-operative effort in establishing the new arrangement. Furthermore, this highlights the benefit of establishing the arrangement through agreement rather than by legislative amendments or fundamental constitutional reform. In other words, this examination of the joint hearing process in the motor carrier field has shown that the benefits of co-operative effort outweigh the liabilities and that the liabilities themselves are not insurmountable. It is not a perfect model to be mirrored in establishing a telecommunications joint panel process, but it does provide the encouragement that a new arrangement could work.

V. Conclusion

It is worth repeating that a commitment to establishing a new process is critical to the success of the joint panel concept. All jurisdictions that will be affected must co-operate in the design and structure of the scheme. The further benefit of such an approach is that it will probably avoid the necessity for a reference to the courts for a resolution of the legal and constitutional issues — an exercise that has the potential for acrimony (if indeed such a feeling is not already present) as well as considerable delay and considerable cost.

It will be recalled that an underlying reason for proposing a joint panel procedure is that an impasse exists in the federal-provincial negotiations and that the impasse can possibly be broken by a co-operative effort to establish a new arrangement. The attractiveness of this approach is that the resulting joint panel concept will not diminish the powers of any one of the jurisdictions. Rather it initiates a new procedure whereby co-operation and mutual understanding are central to the process. Furthermore, the joint panel proposal could be viewed as a short-term solution that allows for a variety of long-term solutions — including the creation of a new regulatory board.

It is encouraging to note that the idea of co-operative effort among telecommunications regulatory agencies is being discussed by some of the members of these same agencies. In a recent presentation, a vice-chairman of the CRTC, John Lawrence, addressed the question of federal-provincial relations, in part, as follows:

> If the regulation of telecommunications is not to be abandoned — and I think it should be clear that I do not think it would be in the public interest to abandon it — decisions have to be made for better or worse. The perpetuation of impasse in this field serves no one's best interests.

> My advice is simple: let's all swallow our pride and be willing to advise, consult, and recommend even when we know the decider in a particular matter may not feel bound to accept our representations. As deciders, let us re-examine our practices and procedures to facilitate the coordination of our decision-making with other deciders having responsibilities for telecommunications matters. In the face of all the concern swirling around us about a written constitution, let's get down to the incremental, practical tasks of instituting and improving our administrative mechanisms to effect a working federalism with respect to telecommunications policy.[39]

In this paper there has been an attempt to describe in a factual sense the working of a joint panel concept. Before the joint panel arrangement can be implemented fully, there is additional work required to provide all of the details that will be necessary. Those details will flow easily if there is a commitment to this new process, and if there exists the spirit of greater co-operation that is essential in order to determine vitally important telecommunications regulatory issues in the public interest. With such an arrangement, governments, regulated carriers, and the public alike will be the beneficiaries.[40]

Notes

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[1] R.J. Schultz, "Partners in a Game Without Masters: Reconstructing the Telecommunications Regulatory System," in *Telecommunications Regulation and the Constitution* (Montreal: The Institute for Research on Public Policy, 1982).

[2] B. Lesser, "The Implications of the Federal and Provincial Proposals for Regulating Telecommunications: An Economist's Perspective," in *Telecommunications Regulation and the Constitution* (Montreal: The Institute for Research on Public Policy, 1982).

[3] R.J. Buchan and C.C. Johnston, "Telecommunications Regulation and the Constitution: A Lawyer's Perspective," in *Telecommunications Regulation and the Constitution* (Montreal: The Institute for Research on Public Policy, 1982).

[4] For a full description of the present telecommunications regulatory structure, see Schultz, *supra*, note 1.

[5] *CNCP Telecommunications: Interconnection with Bell Canada*, Telecom. Decision CRTC 79-11, 17 May 1979 (5 C.R.T. 177).

[6] *Ibid.* at 238.

[7] *Ibid.* at 80.

[8] *Ibid.* at 258–61.

[9] *Supra*, note 1 at 94–95.

[10] In a brief submitted to the federal minister of communications entitled "Brief on the Telecommunications Bill" (November 1979), CNCP Telecommunications also noted the need for a new regulatory body. Buchan and Johnston (*supra*, note 3) were "drawn inevitably to the concept of a new, regulatory board with powers similar to those contemplated in the federal proposal and with a membership capable of reflecting the interests of both levels of government in national telecommunications."

The related issue of provincial government participation in federal regulatory proceedings has been extremely well documented in R.J. Schultz, *Federalism and the Regulatory Process* (Montreal: The Institute for Research on Public Policy, 1979). When one sees examples provided by Schultz of provincial governments giving vent to frustration over participation in the federal regulatory process, there can be a better appreciation of the need for genuinely co-operative activities.

[11] "Federal Proposal to Ensure Efficient Telecommunication Services Between All Points in Canada," Ottawa, 25 August 1980 at p. 2 (see Appendix C in this volume.)

[12] *The National Transportation Act*, R.S.C. 1970, c. N–17 (as amended), ss. 64(1) and (2).

[13] *Supra*, note 1 at 105.

[14] Agreement Between Her Majesty the Queen, in Right of Canada, represented by the Minister of Communications and Her Majesty the Queen, in Right of Manitoba, represented by the Minister of Consumer, Corporate and Internal Services, 10 November 1976.

[15] "Application for Cable Television Service to Certain Areas of Manitoba," Public Notice CRTC 1976–132 (30 December 1976) at pp. 2 and 3.

[16] The cable television licences to serve the communities of Selkirk, Portage La Prairie, and Brandon issued to Winnipeg Videon Limited (CRTC Decision 76–650 of 16 September 1976) and Grand Valley Cablevision Limited (CRTC Decision 76–651 of 16 September 1976) respectively were set aside by Order in Council P.C. 1976–2761 (10 November 1976).

[17] *Supra*, note 12. Without going into great detail, it should be noted that telecommunications regulation has historically been conducted by the regulatory agency responsible for transportation. A possible reason has been the association between transportation and communications, which arose when telegraph wires were strung along the railway rights of way. All of this to explain that the National Transportation Act is applicable to the CRTC in its exercise of telecommunications jurisdiction — see ss. 14(2) and (3) of the *Canadian Radio-television and Telecommunications Commission Act*, S.C. 1974–75–76, c. 49.

[18] *City of Prince Rupert, Connecting Agreement with B.C. Telephone Company: Appointment of Committee of Inquiry and Directions on Procedure*, Telecom. Decision CRTC 77–9 (3 C.R.T. 262).

[19] See, for example, the case of *Transportation Pipeline Company Limited* v. *National Energy Board*, [1979] 2 F.C. 118 where a legislative provision comparable to s. 81 of the National Transportation Act was considered.

[20] *Manitoba Public Utilities Board Act*, C.C.S.M., c. P–280 (as amended).

[21] The relevant, legal maxim is *delegatus non potest delgare*, that is, the person on whom a duty is delegated cannot lawfully devolve the duty on another unless express authorization is provided.

[22] Newfoundland, Prince Edward Island, and Saskatchewan currently do not have the requisite powers.

[23] *Report of the Committee on Extension of Service to Northern and Remote Communities* (Ottawa: CRTC, 1980). "The nine members of the Committee were drawn from various provinces and regions. Five are members of the CRTC, but all acted as independent

citizens in participating in the Committee's work. Although this report is addressed to the Chairman of the CRTC, it is also a public report to the people of Canada."

[24] This proceeding is a good example of the length of time it takes to consider a major issue. The terminal attachment proceeding was commenced on 13 November 1979 when Bell Canada applied to the CRTC for an order approving an amendment to the Bell General Regulations that govern the attachment of devices to Bell's facilities. The CRTC delivered an interim ruling on 5 August 1980 in Telecom. Decision CRTC 80-13 (summarized in 1 C.R.R. B90). There have been many public notices and decisions released by the CRTC with respect to this issue, far too numerous to list in this note. Of further relevance is CRTC Telecom. Public Notice 1981-8 (2 C.R.R. 1-43) in which the CRTC directed that all of the federally regulated carriers (except Telesat Canada) be joined as applicants with the Ontario Hospital Association, which had applied for status as an applicant.

[25] *Ibid.*

[26] In Telecom. Public Notice 1981-37, the CRTC ruled that it would not hold the public hearing in more than one location but would provide an opportunity for representations to be made in British Columbia before the same commissioners who presided at the public hearing in Hull, Quebec.

[27] Prince Edward Island Supreme Court — In Banco, 17 June 1981, unreported (summarized in 2 C.R.R. 3-43).

[28] *Bell Canada — Interim Requirements Regarding the Attachment of Subscriber-Provided Terminal Equipment*, Telecom. Decision 80-13, 5 August 1980 (summarized in 1 C.R.R. B90).

[29] *Supra*, note 24 at 24.

[30] For an excellent study respecting motor vehicle transport regulation in Canada, see F.P. Nix and A.M. Clayton, *Motor Carrier Regulation: Institutions and Practices* (Ottawa: Economic Council of Canada (Regulation Reference)/The Institute for Research on Public Policy, 1980).

[31] *Attorney-General for Ontario* v. *Winner*, [1954] A.C. 541, [1954] 4 D.L.R. 657, 13 W.W.R. (N.S.) 657, P.C.

[32] *Motor Vehicle Transport Act*, R.S.C. 1970, c. M-14.

[33] Note the legal distinction that there has not been a delegation of federal power to the provinces; rather there has been the adoption by Parliament of the legislation of provincial governments. See *Coughlin* v. *Ontario Highway Transport Board*, [1968] S.C.R. 569, 68 D.L.R. (2d) 384.

[34] *Supra*, note 15 at section 3.

[35] An important part of the *Winner* case (*supra*, note 31) is that the federal government has jurisdiction over extraprovincial motor carrier operations and that any operation which has any extraprovincial business at all is considered an extraprovincial operation. Therefore, even if 99 per cent of a firm's routes and traffic occur within one province, it is considered extraprovincial if the remaining 1 per cent crosses a provincial boundary. In fact, it is estimated that while less than one third of motor carrier industry revenue is attributable to extraprovincial operations, at least two thirds of industry revenue is generated by extraprovincial carriers.

[36] The history of joint proceedings regarding motor vehicle regulation is not entirely clear. It appears that the provinces of Ontario and Manitoba have held joint hearings since the 1950s under an informal, administrative arrangement. The turning point occurred in September 1976 when the provinces of Alberta, Saskatchewan, Manitoba, and Ontario held a joint hearing to consider an application by Gorski Bulk Transport Limited. Since that time joint hearings have increased in frequency and acceptability.

[37] *In re H. & M. Express Lines Ltd. and Highway Traffic and Motor Transport Board of Manitoba* (1968) 3 D.L.R. (3d) 69 (Man. C.A.).

[38] See, for example, remarks by Hugh G. Morris, Q.C. to the Canadian Highway Transport Lawyers' Association (5 December 1980) during which he noted a lack of unanimity on the issue of joint hearings and while recommending the retention of existing boards with procedural improvements regarding joint hearings.

[39] John Lawrence, "Notes for a Talk at the Symposium on Information Technology and Society," University of Toronto (November 1981), published as the Commentary in 2 C.R.R. 5-235.

[40] The federal minister of communications and his provincial counterparts appointed a task force in 1981 to study possible joint regulatory mechanisms. Appropriately, the task force was co-chaired by Mr. Jean Fournier, then assistant deputy minister, federal Department of Communications (he has since left to join the federal Department of Finance) and Mr. David Colville, director, Communications Policy, Government of Nova Scotia.

In November 1981, the Fournier/Colville task force entertained submissions from representatives of the member companies of the TransCanada Telephone System, CNCP Telecommunications, and Gregory Kane. Following that meeting and consideration of other written materials including the papers presented in this volume, Messieurs Fournier and Colville sent a report to the various ministers of communications early in 1982. At that point, the timing of the next meeting of ministers of communications was tied to the CRTC Pay-Television decision. When that decision was released in late March 1982, the ministers scheduled a meeting for May 1982, at which time they were expected to discuss issues relating to pay-television as well as the Fournier/Colville report on joint regulatory mechanisms.

It is understood the ministers will be presented with three options concerning possible joint regulatory mechanisms: (1) Ministerial Guidance Option — ministers in the various jurisdictions would provide guidance to their respective regulatory agencies and this would be reinforced by the agencies themselves participating in an association of agencies on an informal basis; (2) Consultation Option — following the submission of applications in the respective jurisdictions from the member companies of the TransCanada Telephone System, the agencies would meet for the purpose of consultation regarding the applications, then they would conduct public hearings in their respective jurisdictions, following which they would once again meet to consult on matters raised in the various hearings with the consultation being not so much to achieve a uniform decision as much as to provide an opportunity for the exchange of information; and (3) "The Joint Hearing Option" — this is a variation of the model proposed by Gregory Kane in this volume whereby agencies would nominate representatives to a joint panel so that one hearing could be conducted with respect to applications filed in the various jurisdictions.

The ministers will be asked to provide approval in principle for one of the options, and if this is accomplished, then a task force will be struck to implement the joint regulatory mechanism in consultation with industry and the interested public.

One difficulty is the fact that this consideration of possible joint regulatory mechanisms has been tied to a meeting at which the matter of pay-television will be discussed. Simply stated, the feelings of the various governments on the pay-television issue are particularly tense. As a result, consideration of a joint regulatory mechanism may suffer either because the ministers will not reach it on the agenda or it may be argued that if the federal government will not co-operate with respect to pay-television, then there will be no co-operation in other areas. On the other hand, if the ministers can agree to a joint regulatory mechanism in which there will be no rearrangements in jurisdictions, then there is a possibility that such a development will provide an opportunity for the various governments to illustrate that some degree of co-operation is possible.

Federal Proposal on Communications to Continuing Committee of Ministers on the Constitution (8 July 1980)*

A

One of the questions before us in communications is, how should we adjust the present framework of responsibilities in order to guarantee the continued successful development of our communications system to meet the challenges of tomorrow? Another is, how can we strengthen our relationships to achieve our objectives better?

I think it is important for us to work within a framework of objectives for communications, to assist us in considering practical and workable proposals to change the present jurisdictional arrangement. The Honourable Marc Lalonde tabled such a statement of objectives in Toronto in December 1978 and I am taking this opportunity to re-table those objectives as an annex to this statement.

In our deliberations, we must be mindful of Canada's communications achievements. Over the last 100 years, Canada's communications system has grown to become a world leader in quality and sophistication. I hasten to emphasize that we all have a right to be proud of these accomplishments — the federal government, the provinces and industry. A second annex highlighting some of these achievements is attached. I am sure it will be of interest to Ministers.

Evolving out of discussions with the provinces between October 1978 and February 1979, various proposals for constitutional change were advanced with regard to cable distribution and telecommunications carriers, and it was agreed to give further attention to accommodating provincial concerns respecting local elements in off-air broadcasting. The objective of the cable draft that was before First Ministers in February 1979 was in part to accommodate provincial concerns for a rational development of intra-provincial communication systems, as well as to ensure that the federal government's national objectives remained achievable. Specifically, the 1979 cable proposal entailed a transfer to provinces of some jurisdiction over cable which is now exclusively federal, taking into account the federal government's responsibility for the Canadian

* Statement of the Honourable Jean Chrétien to the meeting of the Continuing Committee of Ministers on the Constitution, Montreal, 8–11 July 1980, Document 830–81/008.

character of broadcasting and for safeguarding technical standards, as well as federal jurisdiction over closed-circuit programming services to the same extent that the federal government would control off-air services.

While at first, there appeared to be fairly general agreement on that draft, in later discussions it became clear that provinces had serious concerns with it. If we can now find consensus on that proposal then that is commendable. If not, we are willing to consider any other proposals on cable, while always keeping in mind fundamental national objectives.

On broadcasting, the previous federal government said in Halifax in 1979 that if there was sufficient progress on cable, attention could be given to early discussions of provincial concerns respecting local elements in broadcasting. We are not sure what the views of provinces are but we are sure that you share our desire to look at every way to improve the system, with an open mind and the necessary flexibility. We on the federal side want to work with you and make progress on this communications issue. We are willing to consider your views on broadcasting keeping in mind the achievements to date and the needs of the future.

With respect to telecommunications carriers, the federal government is prepared to transfer to the provinces of Newfoundland, Quebec, Ontario and British Columbia the intra-provincial aspects of certain carriers now wholly regulated by the CRTC, namely Terra Nova Tel in Newfoundland, Bell Canada and B.C. Tel. This new arrangement must of course recognize federal jurisdiction in all parts of Canada over all interprovincial and international aspects of telecommunications, technical standards, interconnection of systems and the continuing federal regulation of national carriers, CNCPT, Telesat and Teleglobe.

Any changes should also reaffirm Parliament's jurisdiction over the radio frequency spectrum.

In conclusion, I reiterate how important it is to consider all of these elements in the light of a set of fundamental Canadian communications objectives. Without such objectives I am concerned that discussions of all communication issue areas suggested for constitutional change will suffer from a lack of common purpose and I would urge Ministers to give these objectives full consideration.

We would wish to ensure that progress is made in each area so that the resultant package is a coherent, practical arrangement given that these elements are so fundamentally interrelated. I would hope we can work towards agreement on objectives and will bear them in mind throughout the scrutiny of federal/provincial roles. Let me emphasize that any system that can be implemented that fulfills these objectives will be a good system.

We are prepared to consider change in communications that will result in a rational system and an improvement on our present arrangements, beneficial to the people of Canada in every region.

Federal Draft on Communications*

B

1. Section 91 of the B.N.A. Act would be amended by adding the four following paragraphs:

   91. (w) The frequency spectrum including technical aspects only of frequency assignment.

   (x) Interprovincial and international telecommunications services and the technical aspects of telecommunications.

   (y) Telecommunications works and undertakings transmitting by broadcasting and telecommunications works and undertakings, other than carrier works and undertakings, providing programming or other services beyond the limits of a province.

   (z) The regulation and distribution, including distribution in priority to all other signals through all or any telecommunications undertakings in a province, of a national program service as defined from time to time by Parliament, and the regulation and distribution of non-Canadian programming.

2. Section 92 of the B.N.A. Act would be amended by adding the two following paragraphs:

   92. (y) Telecommunications carrier works and undertakings in the province other than:

   (a) national and international telecommunications carriers;

   (b) space and satellite telecommunications carriers including related earth stations;

   (c) carriage on all or any telecommunications carriers in the province of telecommunications for a national purpose.

   (z) Telecommunications works and undertakings providing programming or other services in the province and not within the jurisdiction of Parliament by virtue of class (y) of section 91.

3. A provision to the following effect would be added:

   The Government of Canada and the governments of the provinces shall consult together at least once in every year, bilaterally or on a regional or national basis, on the formulation, co-ordination and implementation of laws, policies, programmes and practices respecting communications.

* Presented to the Continuing Committee of Ministers on the Constitution, 26–29 August 1980.

Federal Proposal to Ensure Efficient Telecommunication Services Between All Points in Canada*

C

The federal government made the following offer to the provinces, as outlined by the Honourable Jean Chrétien in Montreal on July 8, 1980.

With respect to telecommunications carriers, the federal government is prepared to transfer to the provinces of Newfoundland, Québec, Ontario and British Columbia the intra-provincial aspects of certain carriers now wholly regulated by the CRTC, namely Terra Nova Tel in Newfoundland, Bell Canada and B.C. Tel. This new arrangement must of course recognize federal jurisdiction in all parts of Canada over all interprovincial and international aspects of telecommunications, technical standards, interconnection of systems and the continuing federal regulation of national carriers, CNCPT, Telesat and Teleglobe.

In subsequent discussions, provincial officials expressed strong concerns over the concept of inter-provincial rates being regulated exclusively at the federal level. Provincial concern stems from the relationship which is believed to exist between long-distance services and basic local services, whereby profits from long-distance services are widely used to keep the cost of local services at a reasonable level. Provincial officials fear that if inter-provincial rates were exclusively under federal jurisdiction, federal priorities such as inter-provincial trade and national unity might lead the federal regulator to lower inter-provincial rates, possibly forcing increases in local and intra-provincial rates.

While the federal government does have an undeniable interest in ensuring that, in any new jurisdictional arrangements, rates for nationwide services are treated in a nationally-consistent, coordinated manner, the government also wishes to be fair in accommodating the very real concerns of the provinces in this matter. Accordingly, the federal government would be prepared to create, by means of federal legislation with appropriate provincial input, a new Regulatory Board

* Presented to the Continuing Committee of Ministers on the Constitution, 25 August 1980.

with full-time federal and provincial representation, which would have regulatory authority over all aspects of inter-provincial rates and services provided by the provincial carriers. In addition, provincial governments have, from time to time, expressed concern about the need for governments to jointly decide issues relating to conditions of service such as interconnection. The federal government proposes that the Regulatory Board outlined above be given regulatory jurisdiction over these matters as well.

The Regulatory Board

The Regulatory Board envisioned would be comprised of eleven Commissioners — six appointed by the federal government and five by the provincial governments. The federal Commissioners would likely be appointed from among the CRTC Commissioners; this structure would also lend itself to the appointment of provincial representatives on a regional basis. It is anticipated that any one case would be heard by perhaps three Commissioners, although governments would probably want certain decisions to be approved by the entire Board. Decisions of the Board would be binding on the affected parties, although under existing federal legislation the normal appeal procedures (a decision may be the subject of an appeal to the Courts or a petition to the Governor in Council) would apply.

Discussion

The concept of a new Regulatory Board is felt to be the best possible way of meeting the legitimate concerns of both provincial and federal governments. Although the Board would be created via federal legislation, the provincial representatives would have a direct decision-making role to play in matters of inter-provincial rates and services and in related matters, and could thus ensure that provincial needs and priorities were being recognized. While the federal requirement, that country-wide rates be treated on a national basis, would be met, the Board would also take into account local and regional requirements, and the impact of decisions on basic services.

The approach outlined would have the distinct advantage of presenting no fundamental change in the operating and regulatory procedures for the majority of the carriers. The major provincially-regulated carriers are all members of TCTS, and the interface within TCTS is part of a mechanism which is in place and working very well. TCTS, perhaps as a more formal corporate or quasi-corporate entity, would be subject to regulation by the Board.

Conclusion

The federal government believes that the revised offer outlined above represents a significant modification of its offer of July 8, 1980 and

hopes that the proposed federal-provincial mechanism will accommodate provincial concerns in a way that is consistent with the federal government's legitimate responsibility for ensuring efficient services between all points in Canada and abroad at reasonable, compatible and non-discriminatory rates.

"Best Efforts Draft" by Provincial Governments*

D

(1) In each province the Legislature may make laws in relation to telecommunications works and undertakings in the province notwithstanding that such works and undertakings connect the province with any other or others of the provinces, extend beyond the limits of the province, or emit signals originating in the province beyond the province, or receive or distribute in the province signals originating outside the province.

(2) The Parliament of Canada may make laws in relation to telecommunication works and undertakings mentioned in sub-section (1) other than works and undertakings wholly situate within a province.

(3) No law enacted by the Legislature of a province or the Parliament of Canada under this section shall in its pith and substance be directed to the disruption of the free flow of information.

(4) Any law enacted by the Legislature of a province under sub-section (1) prevails over a law enacted by Parliament under sub-section (2) except a law of Parliament in relation to:

(a) matters of a technical nature respecting management of the radio frequency spectrum;

(b) the space segment of communication satellites;

(c) regulation of Canadian broadcasting transmitting network undertakings that extend to four or more provinces, including the re-distribution of their signals by other telecommunications undertakings;

(d) foreign broadcast signals, including the re-distribution of these signals by other telecommunications undertakings;

(e) the use of telecommunication works and undertakings for aeronautics, radio-navigation, defence, or in national emergencies.

(5) In the event that the laws of two or more provinces conflict so as to disrupt the free flow of information, one of the provinces may petition the Parliament of Canada to enact a law to resolve the specific conflict and such law shall prevail.

* Presented to the Continuing Committee of Ministers on the Constitution, 26–29 August 1980.

Notes for a Statement on Commmunications by the Prime Minister of Canada

E

In approaching our discussion of jurisdiction over communications, we should be mindful of the extraordinary rapidity with which technological change has occurred and is still continuing in the field of electronic communications. This change is creating what has been called the "information society." It draws comments such as the following from observers:

— electronic communications have a greater and greater impact on all aspects of our lives;

— they serve to bring people together over distances and across political borders;

— every sector of communications: telephone, broadcasting, cable, satellites, computers, interconnects with every other part in networks of greater and greater complexity.

These qualities of communications are particularly important in a country like Canada where distances are so large and where the diversity of languages, culture and economic development is so important.

All of us in Canada now take efficient communications for granted. It so happens that, at the moment, the Constitution gives the Government of Canada almost all jurisdiction over the field of communications including telephones. Any new constitutional arrangements must hold the promise of improvement in services for the individual citizen, for the economy, and for the future of the country.

In communications, we are being asked to transfer broad powers to the provinces right across the board. The requested transfers would include control of all telephone companies and telecommunications carriers, including interprovincial and international services. The entire operations of the cable industry would pass into provincial hands. In conventional broadcasting, only the CBC would remain a federal responsibility, together with some authority over the commer-

* This statement was made at the Federal-Provincial Conference of First Ministers on the Constitution, Ottawa, 8 – 12 September 1980 (Document 800 – 14/039).

cial use of programming received off-air from American television stations. Moreover, under provincial demands, the authority of the Government of Canada over the use of the frequency spectrum would be confined to its technical aspects. In regard to satellite communications, we are asked to confine federal authority to the satellites in orbit leaving the provinces to regulate and control the use of stations on the ground.

The Canadian public is entitled to ask what benefit to Canada, to Canadians, to the Canadian economy is to be expected from such a fundamental transfer of authority and we have asked ourselves that same question. We have concluded we cannot accede to the demands of provinces, but we are, nonetheless, proposing important transfers which I shall now summarize.

Concerning telephone, we are prepared to transfer jurisdiction over all telephone companies inside a province. This would mean that authority over Bell Canada, one of Canada's largest corporations, would be transferred to Ontario and Quebec. It would also mean that authority over British Columbia Telephones would be transferred to the Province of British Columbia and authority over Terra Nova Tel in Newfoundland to that province so that all provinces would be in the same position in relation to their telephone utilities. The federal position is clear and simple: what goes on within a province should be provincial; what is interprovincial or international should remain federal. The Government of Canada would retain authority over matters of national interest like interprovincial and international rates and services. Teleglobe, Telesat and CN/CP Telecommunications would remain under federal authority.

Cable is a more complex question. Like telephone, its physical equipment is locally installed. However, a very large portion of the messages it carries — like radio, television, films, etc. — comes from outside the province or indeed outside the country. Its activities also have enormous impact on broadcasting. Thus it is not an easy subject.

Here also, we are proposing important transfers of authority to the provinces. Again we are guided by the intra-provincial, interprovincial principle.

Thus, we propose to transfer to the provinces authority to determine franchise areas and issue licences; to set subscription rates; to authorize and regulate community, instructional, and pay-TV within the province and related advertising; to regulate the two-way use of cable for business purposes and access to information banks; and to authorize and regulate fire alarm, burglar alarm, and other security services. Cable undertakings serving subscribers in more than one province would remain under federal authority.

Cable systems would have to carry a national program service, as defined by Parliament. The use of all foreign programming would be subject to federal regulation.

In broadcasting, provinces propose that the Government of Canada retain the primary responsibility only for the CBC and networks serving four or more provinces. In broadcasting, no clear separation can be made between what is local, regional or national or between the public and private sectors. Thus, we can see only confusion arising from the provincial request for a division of authority in this field.

Hertzian waves that form the frequency spectrum cannot be limited to a particular locality and use of the spectrum is subject to international agreements. Similar considerations apply to the use of space, and to satellite communications. We therefore believe that it would be inconsistent with the federal government's responsibility to make transfers of authority with regard to the spectrum or to space communications including related stations on the ground.

These are the proposals of the Government of Canada. They involve — between our two levels of government — very important divisions of responsibility in a field where the various industries and technologies are closely related and where the objective is keeping people in touch over distances. We believe that whatever solutions we arrive at as a result of our discussions, it will be necessary to develop co-operative institutions and mechanisms to preserve the essential role of communications in Canada.

Monopoly, Competition, and Jurisdictional Issues: Policy Perspectives for the 1980s*

F

Ongoing federal-provincial discussions will have profound policy, regulatory, cultural and financial implications for the orderly development of communications in the 80's. This should be of concern to all of us, whether we are users, providers or suppliers of telecommunications services — in fact, of greater concern to communications groups and associations than has been the case up to now.

Everybody in Canada is entitled to access to telecommunications services at fair prices. This is not to say rates must be the same everywhere. The concept of "fairness" naturally relates to differing costs and circumstances in the various parts of Canada. It may be hard to define, but it is easy to understand.

In any event, it is generally acknowledged that telecommunications in Canada are among the best in the world. The distribution of regulatory authority between the federal and provincial governments, irrational as it may seem to outsiders, has not impeded progress to this point, and there is no evidence that the Canadian public or industry, or any sizable segment of either or both, is clamouring for change. Nor is there evidence that any change would result in users being served as well or better than they are today. Nevertheless, the Government of Canada went out of its way last week to propose substantial transfers of powers in communication matters that lie within each province. More about this later.

While the constitutional conference failed last week [September 8–12, 1980] and discussions on communications are deadlocked at the moment, there is no denying that the extensive discussions which took place over the summer were not wasted. Both levels of government achieved a better understanding of each other's concerns in a field where at the moment the Constitution gives the federal government almost complete jurisdiction. Both sides accepted that communications was an area where both levels of government had reasonable and legitimate interests. It was also agreed that provincial aspirations

* Excerpt from a speech by Jean T. Fournier, Senior Assistant Deputy Minister of Communications, Ottawa, to the 18th Annual Conference of the Canadian Industrial Communications Assembly, Toronto, 16 September 1980, pp. 12–15.

should be met without destroying or distorting what is best in the present communications system. Most important of all, the discussions to date have shown the difficulty of dividing legislative authority in this area, precisely because all modes of communications have *both* local and national aspects which cannot be distinguished or separated by reference to the physical facilities employed. While particular facilities may be purely local in a physical sense (e.g., T.V. and radio stations, cable systems, telephone companies), they provide services that connect all provinces with each other and with the outside world. It is therefore difficult to divide powers in this area, while avoiding the fragmentation of Canadian communications systems and institutions as well as protecting the interests of Canada as a whole. Even the federal proposal tabled at the meeting of First Ministers does not satisfactorily resolve these complexities [see Appendices B and C in this volume].

Not only were there two views of Canada in evidence at the First Ministers' Conference, there were also two strikingly different conceptions of communications in Canada that met head on.

The provinces' position [see Appendix D in this volume] is based on their perception of communications as being primarily local or regional in nature, serving communities of interest, with local and provincial cultural and economic goals being directly affected by the nature of their services. The provincial proposal provides that the provinces would have concurrent jurisdiction over virtually all aspects of communications, with provincial laws being paramount in most cases. For example, the federal government's exclusive jurisdiction over frequency spectrum, broadcasting, Teleglobe, Telesat, CNCP, technical standards, etc., would be limited to certain areas.

In this view, Canadian communications would be no more than 10 loosely linked provincial communications systems. There would be 10 regulatory authorities tripping over each other. The potential for conflict, uncertainty, overregulation and chaos would be enormous.

The federal position is based on the view that there is a national dimension to telecommunications which requires that the regulation of its interprovincial aspects be subject to exclusive federal jurisdiction, and that broadcasting should be regulated as a single integrated system and be subject to exclusive federal jurisdiction. In this view, the federal government would retain jurisdiction over the national dimensions of communications and the provinces would have responsibility over matters which lie within their boundaries. The federal principle for a rational realignment of powers is as clear as can be: what is interprovincial or international remains with the Government of Canada; what is within a province can be subject to provincial control where individual provinces wish it.

Referring during the First Ministers' meeting to the extremely broad communications powers the federal government was being asked to transfer to the provinces, the Prime Minister stated:

> The requested transfers would include control of all telephone companies and telecommunications carriers, including interprovincial and international services. The entire operations of the cable industry would pass into provincial hands. In conventional broadcasting, only the CBC would remain a federal responsibility, together with some authority over the commercial use of programming received off-air from American television stations. Moreover, under provincial demands, the authority of the Government of Canada over the use of the frequency spectrum would be confined to its technical aspects. In regard to satellite communications, we are asked to confine federal authority to the satellites in orbit leaving the provinces to regulate and control the use of stations on the ground [see Appendix E in this volume].

The Prime Minister added:

> The Canadian public is entitled to ask what benefit to Canada, to Canadians, to the Canadian economy is to be expected from such a fundamental transfer of authority and we have asked ourselves that same question. We have concluded we cannot accede to the demands of provinces. . . .

The Prime Minister then described briefly the "important transfers" which the federal government was proposing in matters that lie within each province.

Specifically the federal proposal called for exclusive federal jurisdiction over national carriers, space and satellite carriers, broadcasting and frequency spectrum. With respect to telephone companies the federal proposal provided that each province would have authority over the services and rates within their boundaries, subject to the establishment by Parliament of a Joint Regulatory Board to supervise and regulate interprovincial rates and services [see Appendix C in this volume].

In the area of cable, the federal proposal provided for exclusive provincial jurisdiction over cable operating in a province, subject mainly to federal jurisdiction over distribution of a national program package, to non-Canadian programming, technical standards and the carriage of messages "for a federal purpose."

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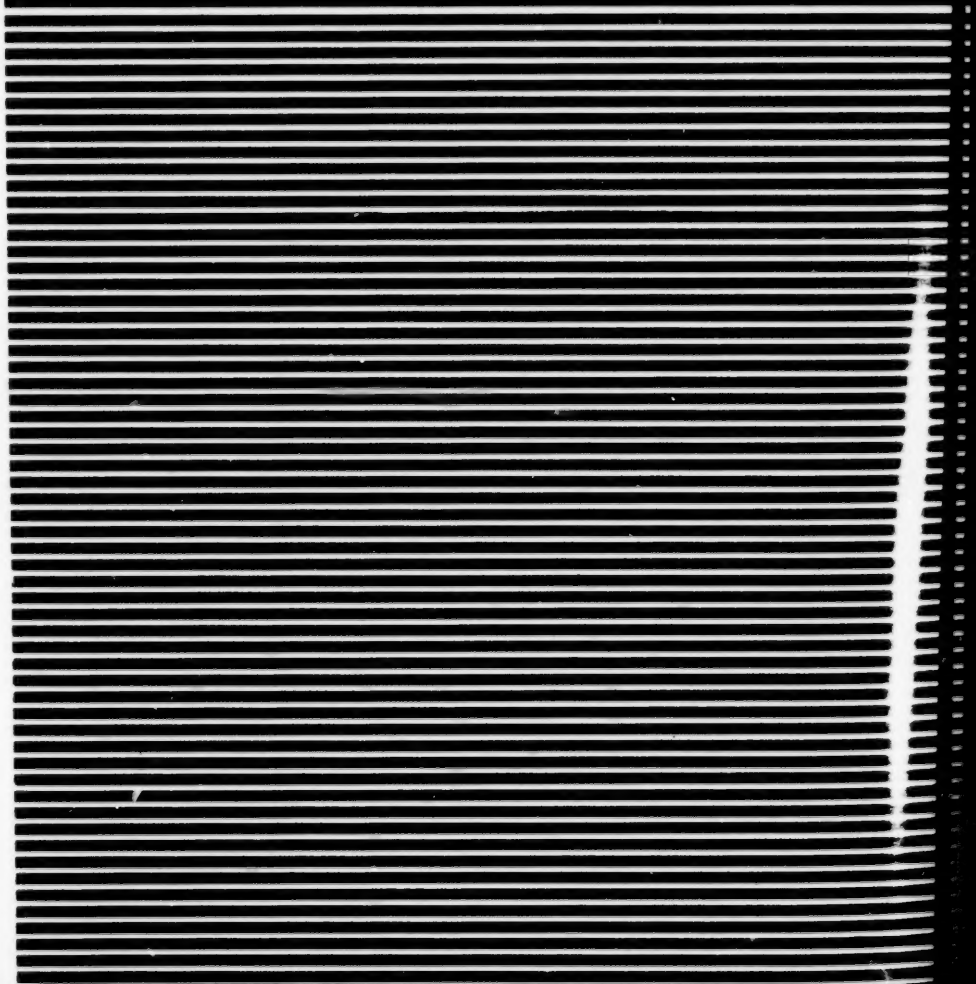
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